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PROMOTION AND PROTECTION OF HUMAN RIGHTS

Letter dated 30 March 2000 from the head of the delegation of Sweden to the fifty-sixth session of the Commission on Human Rights addressed to the Chairman of the Commission on Human Rights

I have the honour to refer to the report of the Secretary-General to the fifty-sixth session of the Commission on Human Rights on the question of fundamental standards of humanity (E/CN.4/2000/94 of 27 December 1999, agenda item 17). As noted in paragraph 27 of the report, Sweden had, in its comments to the Secretary-General pursuant to the Commission's resolution 1999/65, announced its intention to host an expert meeting on fundamental standards of humanity, and offered to report on the outcome of that meeting to the Commission on Human Rights.

The expert meeting was held in Stockholm from 22 to 24 February 2000. It was arranged by the Government of Sweden in cooperation with the Governments of Denmark, Finland, Iceland and Norway. I am pleased to enclose herewith* a report from the expert meeting and request that it be circulated as an official document of the fifty-sixth session of the Commission on Human Rights.

(Signed) Catherine von Heidenstam
Ambassador
Head of Delegation

* The annex is reproduced as received, in English only.

Annex

Report of the Expert Meeting on Fundamental Standards of Humanity

Stockholm
22-24, February 2000

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I. THE EXPERT MEETING

1. An expert meeting on fundamental standards of humanity was held in Stockholm on 22-24 February 2000, for the purpose of discussing the concept of fundamental standards of humanity. The government of Sweden in co operation with the governments of Denmark, Finland, Iceland and Norway arranged the expert meeting. A number of activities were arranged such as the writing of a background paper[1], expert comments on the background paper and workshops on the themes international criminal law, international humanitarian law and custom, human rights and non-derogable rights and on non- state actors.[2] The purpose of the discussions was to examine whether recent developments within the relevant legal framework of the concept of fundamental standards of humanity have solved or will contribute to solving any of the problems involved in the legal protection of persons as originally defined below. One of the underlying questions seems to be why a lower standard of protection of persons should be accepted in internal conflict than in war or peace, and whether the perception that this is the case is correct? Do we need new standards to increase protection or do we already have the standards required? If we do, then why do we need fundamental standards of humanity? These questions were discussed thoroughly at the expert meeting.

2. 53 participants of governments from all regions, international organisations including UN bodies and agencies, regional organisations, non-governmental organisations and scholars, all of which had shown an interest in the matter at an earlier stage, participated at the expert meeting.[3]

II. PURPOSE OF FUNDAMENTAL STANDARDS OF HUMANITY

3. The overall purpose of the concept of fundamental standards of humanity is to strengthen protection of all persons in all situations.

4. When we analyse conflicts occurring in the world today, we find, among the root causes, violations of human rights. The most serious violations take place in situations of internal conflict and strife. We are witnessing aggression, ethnic cleansing and displacement of people, harassment and discrimination.

5. There is a need to address and further discuss the legal protection of persons. Comparison is needed between the two principal legal frameworks for the protection of persons in order to establish whether any absence of physical protection is due to a lack of norms. The situations concerned are mainly internal conflict and strife, which may fall outside the scope of Common Article 3 of the Geneva Conventions and of Additional Protocol II to these Conventions and where effective implementation of human rights may be limited by derogations. On the surface there seems to be a division between the areas of applicability of international human rights and international humanitarian law but nevertheless it is of paramount importance that no human being end up in a void between the two. This consideration has led to efforts to

[1] The background paper was written and presented by Professor Martin Scheinin, Institute for Human Rights, Åbo Academy University, see appendix 2.
[2] For workshop reports see appendix 1.
[3] For a list of participants see appendix 3.

identify fundamental standards of humanity, which would reflect both human rights and humanitarian law and be applicable to all parties in all situations.

III. BACKGROUND

6. The concept of fundamental standards of humanity has been discussed on a number of occasions in recent years. One important input to the discussion was the Turku Declaration of 1990, which, though criticised by some on certain issues, still remains an important contribution to the process of discussing fundamental standards of humanity. The text of the Turku Declaration was transmitted to the Commission on Human Rights in 1994. Since then the matter has been on the agenda of the Commission on Human Rights. In 1996 the Nordic countries, in co operation with South Africa and the International Committee of the Red Cross, organised a work shop in Cape Town to consider the issue of fundamental standards of humanity. The report from the Cape Town meeting was presented to the Commission on Human Rights in 1997 and as a result the Secretary General was asked to submit an analytical report on the issue of fundamental standards of humanity, in co operation with the International Committee of the Red Cross. The report by the Secretary-General was to take into consideration in particular the issues raised in the report of the Cape Town meeting and identify common rules of human rights law and international humanitarian law applicable in all circumstances.

7. Following the Cape Town meeting, the Secretary General submitted a first analytical report on fundamental standards of humanity, presented to the Commission on Human Rights in 1998 (E/CN.4/1998/87 and Add. 1) and a second report to the 1999 Commission (E/CN.4/1999/92). The reports represent a decisive contribution to the development of the issue of fundamental standards of humanity in the 1990's and concluded that the most important purpose of identifying fundamental standards of humanity is to enhance the protection of all persons. A document identifying fundamental standards of humanity would be useful for education- and training purposes as well as in improving respect for and compliance with norms.

8. The discussion on fundamental standards of humanity in the last few years has identified and focused on at least four legal problems involving legal uncertainties, insufficiencies or ambiguities with regard to the protection of fundamental rights during ongoing situations of crisis. These relate to:

1. situations where the threshold of applicability of international humanitarian law has not been reached and a problem appears regarding the application of legal rules in the circumstances: the threshold problem;
2. where the state in question is not a party to the relevant treaty or instrument and the question arises as to how to treat states and other international legal subjects which have not or can not ratify treaties of human rights or humanitarian law: the ratification problem;
3. where derogation from internationally or constitutionally protected rights is invoked: the derogation problem;
4. where the actor is not a government but some other group, and a problem appears regarding the applicability of legal rules as to the duty-bearers: the non-state actor problem.

IV. DEVELOPMENTS DURING THE 1990's OF RELEVANCE FOR THE DISCUSSION ON FUNDAMENTAL STANDARDS OF HUMANITY

9. Recent developments within the legal framework for the protection of persons should be reviewed and discussed in an effort to analyse how far developments have advanced the issue of fundamental standards of humanity.

10. In a series of resolutions since 1991 the United Nations Security Council has recognised that massive and systematic breaches of human rights law and international humanitarian law constitute threats to international peace and security and therefore demand its attention and action, justifying the invoking of Chapter VII. The establishment of international criminal tribunals for former Yugoslavia and for Rwanda, was a major step regarding international legal accountability also of non-state actors. Individuals and members of a group can attract international criminal responsibility regardless of whether they are acting as official government agents or not.

11. The adoption last year of the Statute of the International Criminal Court (hereafter ICC) is a major development of relevance for fundamental standards of humanity. The crimes listed in Articles 6, 7 and 8 of the ICC Statute have been identified by the international community as being of such a serious nature as to warrant international criminalisation and as such they represent unlawful acts in international law that are of importance when discussing fundamental standards of humanity.

12. The work presently being undertaken by the International Committee of the Red Cross (hereafter the ICRC) on international humanitarian law and custom, which aims to identify customary norms applicable in international and non-international armed conflicts, will be of importance in identifying fundamental standards of humanity. It is hoped that the study will at least partly resolve the problem of situations where the threshold of applicability of international humanitarian law has not been reached and a problem appears regarding applicability of legal rules in the circumstances. It has been pointed out that the study deals with armed conflict and will not be relevant to situations which do not justify application of Common Article 3 of the Geneva Conventions. The ICRC study will look at general principles as well as the question of jurisdiction including universal jurisdiction.

13.A series of rights contained in the International Covenant on Civil and Political Rights (hereafter the ICCPR) are non- derogable and applicable in all circumstances, including situations of internal violence. The general comment presently being prepared by the Human Rights Committee concerning derogation from certain human rights obligations in exceptional circumstances will be of importance for the discussion on fundamental standards of humanity.

14. The draft study of the International Council for Human Rights Policy (hereafter the ICHRP) on armed groups confirms the view that further standard-setting by states is not an effective approach in relation to armed groups. The ICHRP study also shows that standards are not the problem. However, standards would be valuable for those who try to engage with non-state actors, in particular with armed groups. Armed groups are not homogenous and there is no single solution.

15. The issues highlighted in the report by the United Nations Secretary-General to the United Nations Security Council on Protection of Civilians in Armed Conflict (S/1999/957) include, among others, the implementation and enforcement of human rights and international humanitarian law, the role of non-state actors, developments in international criminal law and issues of non- derogable rights in the ICCPR. The report reveals political awareness of these problems at the highest level.

16. The Security Council responded to the report by the Secretary-General in Resolution 1265 and urges all parties concerned to comply strictly with their obligations under international humanitarian law, human rights and refugee law.

17. Many of the United Nations rapporteurs on Human Rights investigate not only human rights abuses and violations but also breaches of international humanitarian law standards. This shows the increasing awareness of the importance of combining human rights law and international humanitarian law when carrying out systematic investigations of human rights situations. Both are required, since the two legal fields complement one another.

18. The Guiding Principles on Internal Displacement represent a major step forward in trying to combine different fields of law in order to increase the protection of persons.

V. CONCLUDING SUMMARY

19. One of the main conclusions of the expert meeting is that the concept of fundamental standards of humanity should be seen as a process towards increasing the protection of persons. Upholding the process of promoting awareness and knowledge could best improve the interaction between international humanitarian law and human rights. The process of fundamental standards of humanity includes discussion of the four problem areas that have been identified where there are legal uncertainties, insufficiencies and/or ambiguities with regard to the protection of persons in current situations of crises, in relation to ongoing developments. As such it comprises discussion of a number of relevant issues aimed at enhancing the protection of persons, such as:

1. the identification of fundamental standards of humanity;
2. the problem of derogation;
3. the problem of non-state actors and the need for a strategy vis-à-vis non-state actors;
4. the need for a common strategy for universal ratification;
5. the problem of how to strengthen the implementation of legal norms.

The meeting considered it necessary to continue working on all these issues in the area of fundamental standards of humanity and to discuss the problems identified in relation to developments, so as to achieve the goal of ensuring better protection of all persons in all situations.

20. The threshold problem, the ratification problem, the derogation problem and the non-state actors problem, described above in paragraph 6, were discussed thoroughly at the expert meeting. The solution to these problems is partly to be found in developments in international criminal law, international humanitarian law and human

rights law. When the ICRC study has been published and the new general comment by the HR Committee is ready, they should receive further detailed scrutiny. However, these studies, together with developments in international criminal law, are expected to solve most of the problems described. The expert meeting concluded that either there are no substantial gaps in the legal framework or that it would not serve the overall purpose to devote further study to the question whether gaps exist or not. Many participants were of the view that it would be more correct to talk about legal uncertainties and not gaps in the existing legal framework; therefore the conclusion was also reached that what is needed is not standard-setting but rather a statement of principles clarifying any legal uncertainties. Since identification of fundamental standards of humanity can not on its own solve the problems described, the emphasis in the process of fundamental standards of humanity should no longer be on the identification of common principles, but on continuing discussion of the different issues described above. Identification is thus only one part of the process.

21. It is essential to continue discussions on the process of fundamental standards of humanity in a variety of fora in order to enhance the protection of persons. Discussion of the issues highlighted above must continue as part of the process. One essential conclusion is that it is not acceptable that the standard of protection of persons should be lower in internal conflict situations than in war or peace-time. There is no lack of rules; the challenge lies rather in establishing that there do exist certain principles and common rules applicable in all situations. The Commission on Human Rights should be asked to support the process of fundamental standards of humanity.

22. Even though the meeting reached the conclusion that there are no substantive gaps in the existing legal framework for the protection of persons, it was agreed that there is still a need for a set of principles. These principles, constituting fundamental standards of humanity, would be based on existing standards. Many participants referred to this as a "soft law" document with moral/political weight rather than legal authority. This confirms that work on the fundamental standards of humanity is not a standard-setting exercise but concerns the identification of norms that already exist.

23. Recent developments within the legal framework for the protection of persons will have to be considered in identifying fundamental standards of humanity. As described above, these recent developments include the ICC statute, the case law from the ICTY/R, the study presently being undertaken by the ICRC, the work by the HR Committee on a new general comment to Article 4 of the ICCPR, as well as recent developments concerning engaging non-state actors, such as the draft report on armed groups produced by the ICHRP. This is not an exhaustive list but indicates elements of use in identifying of fundamental standards of humanity. It provides a time frame for the work on identifying fundamental standards of humanity, which can not be completed before all these studies are available.

24. The idea was advanced at the expert meeting that Article 7 of the ICC Statute (Crimes against humanity) provides a list of fundamental standards of humanity. This Article would not provide a catalogue of rights but a list of prohibited conduct, as a basis for defining fundamental standards of humanity. This source should, however, be seen as just one important basis for identifying fundamental standards of humanity without excluding other sources for fundamental standards of humanity.

25. Another aspect of fundamental standards of humanity is the problem of the seemingly weak implementation and weak control mechanisms in human rights law and humanitarian law and the urgent need to strengthen the implementation of legal norms on the ground. This problem appears to be even more serious in relation to non-state actors. The idea has been advanced that a set of principles would help to strengthen implementation and would especially be useful when engaging with non-state actors and when discussing how to reach and how to influence the behaviour of armed groups. Fundamental standards of humanity – meaning a practical and concise set of basic principles restating applicable standards – could carry political/moral force when undertaking dialogue with armed groups and could be a useful tool in a wider approach involving different forms of both incentives and disincentives.

26. It is important to continue discussing both the theoretical and practical issues relating to the implementation of legal norms on the ground, as part of the process, and related questions, such as how to undertake dialogue with non-state actors and how can field-workers promote Human Rights in the field. There are a number of codes of conduct relating to this issue and also a few agreements on ground rules, which indicate how this work is conducted in practice. When working on this part of the process it is of paramount importance to involve practitioners as well as non-state actors. The Operation Lifeline Sudan ground rules were mentioned as an interesting example of basic principles agreed in a concrete situation. Reference was also made to the Guiding Principles on Internal Displacement (E/CN.4/1998/53/Add.2). When looking at this problem, it was noted that there was a need to involve persons who may enjoy high respect among non-state actors, e.g. due to their earlier role as leaders of national liberation movements.

27. The need for effective implementation and dissemination of legal norms was pointed out in the Secretary-General's Report on the Protection of Civilians in Armed Conflict. This shows that there is political support at the highest level for these matters. Therefore the report of this meeting should be forwarded to the United Nations Secretary General as further input to the previous reports on fundamental standards of humanity and as a response and follow-up to the Report on Protection of Civilians in Armed Conflict, with the intention that the Secretary-General might transmit the message from this meeting to the United Nations Security Council and other UN organs. As part of the process of fundamental standards of humanity, a follow-up meeting should focus on how to strengthen the implementation of legal norms on the ground.

28. Legal lacunae are not considered to constitute an obstacle to protection against abuses by armed groups. There are, however, legal questions involved when undertaking dialogue with armed groups. Disagreement over whether human rights norms could apply to non-state actors is a problem. Consensus should be sought as soon as possible on which standards should apply to non-state actors. It was suggested that human rights norms should be applicable to "de facto states" controlling parts of a territory. In the case of other groups with control over parts of a population, the issue was less clear. However, states might not be prepared to give non-state actors the recognition that would be implied by putting them under direct obligations under international law, although the argument was put forward that the problem of

legitimisation could be solved in such circumstances by using standard disclaimer formulations. An additional meeting to discuss non-state actors should be held as part of the process of fundamental standards of humanity.

29. Questions relating to states of emergency should be considered as part of the process of fundamental standards of humanity. A Special Rapporteur on states of emergency would be very useful e.g. to examine the effect of states of emergency on the protection of fundamental rights and the various safeguards necessary in such situations. In practice States do not always follow the procedures laid down in Article 4 of the ICCPR for giving notice of derogations, but derogate *de facto* from rights provided for in the ICCPR. Although this is a problem in that the procedure of Article 4 is not fulfilled, it was underlined that in these cases the State concerned continues to be bound by all treaty obligations. Another problem related to the *de facto* use of derogation are a broad interpretation of derogable rights. It should be taken into account that not all States are parties to the ICCPR. It would be very useful for the process of fundamental standards of humanity if the United Nations Secretary-General were to initiate a study of states of emergencies and how they have been dealt with by the international system.

30. A compilation of the existing norms for the protection of persons, including various different kinds of codes of conducts for different actors and/or situations, would also be very useful. If the United Nations Secretary-General could initiate such a compilation, this would be extremely welcome. Also an "easy-reference-guide" to rules from the different fields of law regulating the protection of persons would be very useful for the work on the ground. OCHA has recently prepared such an "easy-reference-guide" and it would be very useful if the Secretary general could help to disseminate it.

Appendix 1. WORKSHOP REPORTS
THE EXPERT MEETING ON FUNDAMENTAL STANDARDS OF HUMANITY IN STOCKHOLM, 22-24 FEBRUARY,2000

Four workshops were held at the expert-meeting. The purpose of the workshops was to enable a discussion on fundamental standards of humanity in view of the developments during the 1990's. and to reflect on the questions and problems identified in the background paper. The following sections consists of reports from the workshops.

1. Workshop concerning international criminal law
Chairman: Mr. Per Saland, Sweden
Rapporteur: Ms Gro Nystuen, Norwegian Institute for Human Rights

The workshop took the ICC Statute as the point of departure since it represents the latest developments in the field, and used the four identified problem areas in Mr. Scheinin's paper as a starting point.

The first area in which problems may appear are where the threshold of application of international humanitarian law is not reached and a problem of application of legal rules as to the circumstances appears. Since two of the crimes within the jurisdiction of the ICC – genocide and crimes against humanity – apply in all situations (peace-time, disturbances, internal armed conflicts and international) it was felt that the Statute went a good way towards closing the gap consisting of the threshold for the applicability of international humanitarian law. Other thresholds, though, applied for these crimes (genocidal intent, the context of a widespread of systematic attack). As for war crimes it was noted that the threshold in the ICC Statute for common article 3 remained largely that of the four Geneva Conventions, and that for other violations in conflicts not of an international character, the threshold had been significantly lowered compared to Additional Protocol II of the Geneva Conventions.

The second identified area of law which may cause problems concerns ratification and where the state in question is not a party to the relevant treaty or instrument. The group felt that the ICC Statute would contribute to closing this gap as well. Directly it would do so through the two alternative bases for the exercise of jurisdiction in article 12 (territory or nationality of the accused), which went some way towards universal jurisdiction implying that also non-parties could be affected by prosecutions before the ICC. Indirectly, the Statute would induce both States which become parties and States which choose not to do so to conform their penal legislation to the definition of the crimes in the Statute so as to be able to prosecute at the national level those accused of such crimes and thereby to avoid prosecutions of their nationals or of crimes within their territory before the ICC. Also, it was felt that States – parties and non-parties, wo ld be encouraged to look upon their jurisdictional provisions with the same aim. That would favor universal jurisdiction over the crimes in question. Thus, the most tangible effects concerning this identified problem area would be indirect.

Concerning where derogation from the specified standards is invoked some participants felt that some provisions of the ICC Statute, in the preamble, article 1 and

elsewhere, served to reinforce commitments under other instruments not to derogate and to do so only in a limited and target-oriented way, since obligations under a multitude of instruments were mutually reinforcing and parts of one derogable right would actually serve to underpin another, non-derogable right. Other participants did not immediately see such an effect of the ICC on this particular gap. It was felt that this issue needed further reflection.

Since individual criminal responsibility under the ICC Statute is incurred by natural persons regardless of position as agent of the State or not (article 25, see also article 28), for the purposes of the Statute (and is corresponding national law) there is no problem of application of legal rules as to the duty-bearers appears where the actor is not a government, but some other group.

The workshop also discussed whether genocide and crimes against humanity do actually form part of human rights law or international humanitarian law with their different connotations and legal traditions. Most felt that they are part of both, but it was also suggested that they are *sui generis* and perhaps are part of none. The *sui generis* concept lead to the idea that the fundamental standards of humanity would also be *sui generis*. If formulated in such a way, they would avoid the complication of carrying with them the connotations of each body of law. Perhaps such an approach, taking crimes against humanity as a point of departure, could demonstrate the pedagogical value of a simply formulated fundamental standards document. However, time did not allow for a discussion of this very tentative idea.

2. Workshop concerning international humanitarian law and custom
Chairman: Mr. Göran Melander, Raoul Wallenberg Institute
Rapporteur: Ms Margit Tveiten, Norway

The discussion in the workshop was partly a continuation of the discussion in the plenary sessions concerning the need for fundamental standards of humanity, are there remaining gaps etc., and partly a debate on customary international law, which was the special topic for this workshop.

Several participants expressed some doubts about the usefulness of focussing on gaps. In stead, it was argued, one should concentrate on what norms are already applicable and relevant to the topic of fundamental standards of humanity. In that context, the forthcoming study of the ICRC on customary humanitarian law will be extremely important. It will, in a very authoritative manner, demonstrate the existence of several of the norms we are concerned with in the context of fundamental standards of humanity.

There was common agreement that the main issue relates to the lack of compliance with rules of international humanitarian law, rather than the lack of applicable rules. Many participants referred to the situation in Chechnya.

Efforts should be concentrated on dissemination of applicable rules, training etc. If the aim is to spread knowledge and thus contributing to better compliance, any possible set of fundamental standards of humanity should be very condensed ("10 Commandments"), and not detailed. Furthermore, if detailed rules were to be

elaborated as part of the fundamental standards, e.g. rules on warfare, weaponry etc., it must be done as proper standard setting in a different context.

In the workshop there was some discussion of how to proceed with the project of fundamental standards of humanity. There were proposals that a wider geographical spread should be ensured. In particular, this should include people from areas where there are conflicts, and possibly people who had been involved in conflicts, as victims or as part of armed groups.

3. Workshop concerning human rights and non-derogable rights
Chairman: Mr. Sebastien Sigouin, Canada, Co-chair Mr. Nalin Abeysekera, Sri Lanka, Rapporteur: Ms Raili Lahnalampi, Finland.

There was agreement that the question of identifying non-derogable rights is an essential element in addressing and bridging any possible substantive gaps between the threshold of applying the Common Article 3 of the Geneva Conventions and Article. 4 of the International Covenant of Civil and Political Rights (hereafter the ICCPR). It will also contribute towards mapping the non-derogable rights and determining which one should be included as Fundamental Standards of Humanity and deciding from there how we can move forward.

There are many important developments which will contribute to our understanding on non-derogable rights and their interpretation and which will further the process of defining the Fundamental Standards of Humanity. Among these developments are the Draft General Comment on Article 4 by the Human Rights Committee and the forthcoming ICRC study on international humanitarian law and custom.

The work of the Human Rights Committee in developing its interpretation of non-derogable rights will be of key importance. It was considered important that the Committee should examine the relationship between non-derogable and derogable rights, the distinction between derogations and restrictions, the relevance of 'other international law obligations', the question of circumstances in which derogations can be considered permissible. One should not expect the Committee to provide a detailed and exhaustive list of circumstances, but rather a flexible guide. In doing so, the Committee should also take into account existing jurisprudence from other bodies such as the European Court of Human Rights or the Inter-American Court of Human Rights.

It was pointed out that in practice States do not follow the procedures laid down in Article 4 of the ICCPR in notifying the derogations, but *de facto* derogate from rights provided for in the ICCPR. Although a problem in terms of not fulfilling the procedure of Article 4, it was underlined that in these cases the State concerned continues to be bound by all treaty obligations. Other problems related to the *de facto* use of derogation are a broad interpretation of derogable rights and absence of international monitoring system.

It was noted that parallel to the work of the Human Rights Committee and pending the outcome of the ICRC study on international humanitarian law and custom, the issue of Fundamental Standards of Humanity should be given attention also in other fora, to

gain political momentum. Several options to use either existing human rights mechanisms (integrating the issue into the mandate of thematic and country rapporteurs) or create a new mechanism (Special Rapporteur on State of Emergeny of the CHR, or SR of the Secretary General) were discussed. Reference was made to the limited resources within the UN human rights budget as well as the ongoing review of treaty bodies. Discussion on the issue at one of the forthcoming meetings of the chairs of treaty bodies and Special Rapporteurs was considered useful to establish how the process could be brought forward. The Human Rights Committee itself could also be invited to use the tools it has (special rapporteur, special reports on state of emergency) and to be more proactive.

4. Workshop on non-state actors
Chairman: Mr. Ben Kioko, OAU, Co-chair: Professor Vitit Muntarbhorn, Chulalongkorn University, Rapporteur: Mr Niklas Kebbon, Sweden

In order to enable all interested participants to attend, this workshop was held after the conclusion of – and not in parallel with - the other three workshops. As an introduction, it was pointed to the complex character of the question of non-state actors. Firstly, non-state actors could have many different *characters*. They could, depending on the specific situation, be armed groups, NGO:s, civil societies, businesses/multinational companies, criminal networks or liberation movements. Secondly, they could have various *roles*, such as that of participants in evolving Fundamental Standards of Humanity (since they often would not accept norms elaborated without their participation), beneficiaries (seen from the perspective of individual members), protectors/monitors (through peer pressure) or violators of such standards. Thirdly, there was a wide variety of possible *measures to try to influence* non-state actors to respect human rights/humanitarian law norms ranging from dialogue and other forms of engagement, such as training (carrots), to enforcement of legal accountability, sanctions and possibly recourse to the United Nations Security Council (sticks).

The workshop then listened to a brief account of the International Council for Human Rights Policy's draft report on *human rights approaches to armed groups*. The draft report was based on research in ten countries and focused on what types of action had been taken to influence armed groups to respect human rights, what types of action had been successful and what had been the obstacles to taking action and how these obstacles might be overcome. Two questions were of particular relevance to the expert meeting: How to engage armed groups in order to have them respect human rights and humanitarian law and whether the formulation of Fundamental Standards of Humanity was useful for this purpose. The draft report attempted to list factors affecting the success of interventions with armed groups, relating respectively to the character of the armed group, the role of civil society and the role of the state/armed forces. For example, groups characterized by openness and tolerance of dissent were typically more amenable to human rights interventions, although an authoritarian structure meant a greater possibility to exert control over abuses by individual members. Other factors were the existence of foreign sponsors, including in the private sector, and the group's constituency and whether it could be engaged. The perceived legitimacy of the state was crucial regarding how people related to armed groups.

The research had not identified, it was pointed out, legal lacunae as obstacles to protection against abuses by armed groups. There were, however, legal questions involved in engaging armed groups. The disagreement over whether human rights norms could apply to non-state actors was a problem.

In the subsequent discussion it was noted that international law lacked clarity in putting obligations directly on non-state actors. Responsibility for crimes against humanity applied to armed groups, as did generally international humanitarian law, at least common article 3 to the Geneva Conventions and Additional Protocol II. Recent developments in international criminal law, most notably the adoption of the Statute of the International Criminal Court, were also important, but would probably not be applied frequently. One participant pointed out that individual responsibility for grave breaches of international humanitarian law was already today subject of universal jurisdiction, although states did not always implement their responsibility in that regard. The study presently undertaken by the ICRC on customary rules in the field of International humanitarian law could prove important as regards obligations by non-state actors. Nevertheless, some participants thought that these standards were not adequate in addressing the main problem; protection against acts of armed groups.

It was argued that consensus should be sought as soon as possible on which standards should be applicable for non-state actors. One participant suggested that human rights norms should be applicable to "de facto states" such as the Taliban-controlled part of Afghanistan, Northern Iraq under Kurdish control and the Palestinian Authority. In the case of other groups with control over parts of a population, such as the LTEE/Tamil Tigers or the SPLA, the issue was less clear.

Others pointed out, however, that states were not prepared to give non-state actors the recognition that would be implied by putting direct obligations on them under international law (although it was argued by one participant that the problem of legitimization could be solved with standard disclaimer language used in such circumstances).

Several participants felt that rather than identifying applicable standards as such, the crucial question for improving the protection of persons in situations of internal violence was one of implementation; how to reach and how to influence the behavior of armed groups. Fundamental Standards of Humanity – meaning a practical and concise set of basic principles restating applicable standards – could, however, carry political/moral force when undertaking dialogue with armed groups. While some skepticism was expressed, many felt that such a document could be a useful tool in a wider approach involving different forms of both incentives and disincentives. The ground rules agreed between SPLM and Operation Lifeline Sudan was mentioned as an interesting example of basic principles agreed in a concrete situation. Reference was also made to the guiding principles for internally displaced persons developed by the secretary-general's Representative, Francis M Deng. When looking at this problem, it was noted, there was a need to involve representatives of non-state actors in such a process, e.g. former liberation movements such as the ANC or the PLO.

The question of defining the term non-state actor was raised. Many participants felt that due to the complexity of actors in different situations it would be very difficult to

agree on a definition. For operative purposes, a differentiation needed to be made between different categories of armed groups in order to identify adequate interventions (although the promoted standards needed to be the same for all). Armed groups seeking recognition by the international community were typically more willing to assume obligations, whereas a legal approach would be less effective with "war lords".

FUNDAMENTAL STANDARDS OF HUMANITY
International Expert Meeting,
Stockholm 22-24 February 2000

Background Paper

by Martin Scheinin,
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1. INTRODUCTION

This background paper consists of four sections: this short introduction and three substantive chapters. In section 2, the so-called Turku Declaration of Minimum Humanitarian Standards is introduced, together with brief references to certain criticisms it has met with. Section 3 includes a presentation of the main reasons for behind the Turku Declaration and, more generally, what is here called the project on fundamental standards of humanity. These reasons relate to so-called "gaps" in the relevant framework of international law, namely international human rights law and international humanitarian law taken together.

Section 4 constitutes the body of the paper. It includes, depending on the issue, detailed or summary, discussions on the main efforts of the 1990s to address the gaps that originally gave rise to the project on fundamental standards of humanity. Some of these processes of filling the gaps are still underway. Derogation under human rights treaties, progress in ratification by States, identification of customary humanitarian law, the accountability of non-State actors, developments in international criminal law, certain developments parallel to article 7 of the Turku Declaration and the UN Security Council's work on protection of civilians in armed conflict are the seven sub-themes discussed.

Finally, section 5 presents the conclusions of the paper in the form of three questions for discussion during the Stockholm expert meeting: Are there gaps that remain? What type of a new international instrument on fundamental standards of humanity would be useful? What are the next steps on the road? The conclusion drawn from the developments discussed in section 4 is that it is still necessary to work towards one overall document representing a compilation of fundamental standards of humanity. The gaps identified in section 3 have not lost their relevance although many of the recent or ongoing developments are capable of addressing one or more of the gaps, usually in relation to certain dimensions of the gap. The mere complexity of the resulting framework of international standards is, however, even alone a sufficient reason to work towards an overall compilation. One of the purposes of such a compilation of fundamental standards of humanity is to serve as a pedagogic tool. As to the form of an instrument on fundamental standards of humanity, a soft law document is proposed as the priority option, *inter alia* in order to involve non-governmental actors in its formulation and adoption. Finally, it is submitted that a network of experts is entrusted

with the task of drawing up a draft on the basis of the many recent and ongoing developments discussed in section 3.

2. TEN YEARS SINCE THE TURKU DECLARATION

2.1. Adoption of the Turku Declaration

On 2 December 1990 a group of experts convened at the Åbo Akademi University Institute for Human Rights in Finland approved a document called "Declaration of Minimum Humanitarian Standards" which nowadays is internationally known as the "Turku Declaration".[1]

The approval by a group of experts of the text of the Turku Declaration was neither the beginning nor the end of a more general process aimed at the strengthening of the protection of fundamental rights during various states of emergency. The Oslo Statement on Norms and Procedures in Times of Public Emergency or Internal Violence (1987)[2] can be seen as an earlier product of the process that lead to the Turku Declaration. There have, however, been many other preceding, parallel and subsequent processes that have addressed essentially the same problem: the unsatisfactory status of international law in relation to protecting some of the most fundamental human rights in situations of crisis.[3]

2.2. Substance of the Turku Declaration

The Turku Declaration starts with a preamble, clearly formulated as a declaration to be adopted by the United Nations but not mentioning the UN body that would adopt the text. After the preamble, 18 substantive articles follow, proclaiming the following rights and principles:

Article 1: The *nature* of minimum humanitarian standards as norms that are applicable in all situations, including internal violence, disturbances, tensions, and public emergency, and which cannot be derogated from under any circumstances.

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[1] Turku is the Finnish-language name of the city in which the Åbo Akademi University is located, Åbo being the name of the same city in Swedish.

[2] Published in Mennesker og Rettigheter: Nordic Journal on Human Rights, Vol. 5, No. 3 (1987) pp. 2-4 and in UN doc. E/CN.4/Sub.2/1987/31.

[3] In the preamble of the Turku Declaration, this concern was expressed in the following terms: "Noting that international law relating to human rights and humanitarian norms applicable in armed conflicts do not adequately protect human beings in situations of internal violence, disturbances, tensions and public emergency;..."

Article 2: The *applicability* of minimum humanitarian standards to the benefit of all individuals and in relation not only to States but "all persons, groups and authorities, irrespective of their legal status".

Article 3: Certain *substantive* rights derived from human rights treaties and international humanitarian law: recognition everywhere as a person before the law, respect of all individuals for their person, honor and convictions, freedom of thought, conscience and religious practices, and the right to humane treatment. (para. 1). A list of internationally prohibited acts, *inter alia* murder, torture, rape, collective punishments, taking of hostages, pillage etc. (para. 2)

Article 4: Basic rights of the *detained*.

Article 5: Applicability of certain basic norms of *humanitarian law* in all circumstances: prohibition of attacks against non-combatants, proportionality of the use of force, prohibitions against illegal weapons or methods of warfare.

Article 6: Prohibition against *terrorizing* the population.

Article 7: Norms applicable in relation to the *displacement* of the population or parts thereof (para. 1). "No persons shall be compelled to leave their own territory" (para. 2).

Article 8: Right to *life*, including restrictions for the use of capital punishment.[4]

Article 9: Basic *fair trial* rights in criminal cases.

Article 10: Special protection of *children*, including the prohibition against recruiting or accepting to armed forces or armed groups or to take part in acts of violence children under 15 years of age. "All efforts shall be made not to allow persons below the age of eighteen to take part in acts of violence."

[4] This is one of the provisions in the Turku Declaration that have met with criticism, mainly because of its use of unclear language. First sentence of para. 3 reads: "In countries which have not yet abolished the death penalty, sentences of death shall be carried out only for the most serious crimes". Although not intended, this has been read to suggest mandatory capital punishment in certain cases.

Article 11: *Judicial guarantees* against assigned residence, internment or administrative detention.

Articles 12-13: Special protection of *the wounded and sick* and due respect for the *dead*.

Article 14: Special protection of *medical and religious personnel*.

Article 15: Access by *humanitarian organizations* in situations of internal violence, disturbances, tensions or public emergency.

Article 16: Special protection of *minorities*: "In observing these standards, all efforts shall be made to protect the rights of groups, minorities and peoples, including their dignity and identity."

Article 17: *Non-recognition clause*: "The observance of these standards shall not affect the legal status of any authorities, groups, or persons involved in situations of internal violence, disturbances, tensions or public emergency."

Article 18: *Savings clause*, stating that the Declaration cannot be used for restricting or impairing the provisions of any international humanitarian or human rights instrument (para. 1) or for restrictions upon or derogation from fundamental rights recognized elsewhere (para. 2).

2.3. Subsequent revision and criticisms of the Turku Declaration

In 1994, at an international expert meeting convened at the Norwegian Institute of Human Rights, certain needs to modify the text of the Turku Declaration were discussed on the basis of expressed criticism and changes in the nature of conflicts in the 1990s. A revised version of the Turku Declaration was submitted to the Commission on Human Rights by Norway and Finland.[5]

Over the years, however, there has been more fundamental criticism in relation to the Turku Declaration of Minimum Humanitarian Standards.

[5] UN doc. E/CN.4/1995/116. Article 8 (3) was modified to avoid the impression that capital punishment was mandatory in some circumstances. The prohibition against using the Turku Declaration for lowering the protection afforded by other instruments was emphasized by moving it from art. 18 (2) to art. 1. Art. 7 on displacement was strengthened by adding the right to remain. The changing nature of conflicts was taken into account by adding references to "ethnic, religious and national conflicts" in all pertinent paragraphs.

One dimension of this criticism has been directed to the notion of *minimum* humanitarian standards which perhaps from the beginning was not accurate when the intention was to find ways to obtain *additional* protection to standards that must be respected in all circumstances and that to a large extent are derived from valid sources of international law. Later on, the debate has focused around the notion *fundamental standards of humanity*.[6] Although some critical comments are quite straightforward in questioning the whole exercise of trying to identify fundamental standards of humanity applicable in all circumstances,[7] the general trend has been favorable to this basic idea behind the Turku Declaration of 1990.[8]

3. THE NEED FOR DEVELOPING THE STANDARDS: IDENTIFYING THE GAPS IN EXISTING LEGAL INSTRUMENTS

In their note that introduced the Turku Declaration to the readers of the American Journal of International Law, Asbjørn Eide, Allan Rosas and Theodore Meron referred to the notion of a "gray zone" in explaining why a declaration of minimum humanitarian standards was seen necessary. The authors noted that although existing treaties and identifiable standards of humanitarian law and human rights law were many, four significant problems as to the protection of fundamental rights during current situations of crisis could be identified:

(1) where the threshold of applicability of international humanitarian law is not reached;

(2) where the state in question is not a party to the relevant treaty or instrument;

(3) where derogation from the specified standards is invoked; and

(4) where the actor is not a government, but some other group.[9]

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[6] See, for instance UN doc. E/CN.4/1997/77/Add.1, including the report of the International Workshop on Minimum Humanitarian Standards, held in Cape Town in September 1996, and UN doc. E/CN.4/1998/87, Minimum humanitarian standards: Analytical report of the Secretary-General submitted pursuant to Commission on Human Rights Resolution 1997/21.

[7] See, Anna-Lena Svensson-McCarthy, Minimum Humanitarian Standards – from Cape Town Towards the Future, ICJ Review No. 53/1994 pp. 1-29, at p. 18.

[8] See, David Petrasek, Moving Forward on the Development of Minimum Humanitarian Standards, AJIL 92 (1998) 557-563.

[9] Asbjørn Eide – Allan Rosas – Theodore Meron, Combating Lawlessness in Gray Zone Conflicts through Minimum Humanitarian Standards, AJIL 89 (1995) 215-223.

This classification of four gaps has remained valid and will be applied in this paper. Below, following names will be used for the four gaps:

(Gap No. 1) *Application gap as to the circumstances.* Because fundamental rights of individuals tend to be blatantly disregarded in such situations of internal disturbance or violence that do not rise to the thresholds of Common Article 3 or Protocol II to the Geneva Conventions, international humanitarian law is not applicable in such situations. This becomes all the more serious when one notes that instruments of human rights law tend to have normalcy as their presumed environment of application and fail to address many of those problems that arise during violent situations and are traditionally left for humanitarian law to regulate. Even if a situation qualifies as a non-international armed conflict, the rather minimal guarantees of Common Article 3 may be the only applicable humanitarian law rules, as the applicability of Protocol II is subject to another threshold.

(Gap No. 2) *Ratification gap.* No treaty of international humanitarian law or human rights law has met with fully universal ratification, although the four Geneva Conventions and the Convention on the Rights of the Child come quite close (188 and 191 ratifications, respectively). What is more alarming is that some of the instruments that tend to become particularly relevant in situations of crisis have a ratification record below the average and it is often those States that fail to ratify that are at high risk to become a scene of some sort of violent conflict. Protocol II to the Geneva Conventions has been ratified by 149 States, the Convention against Torture by 118 States, the Optional Protocol to the Covenant on Civil and Political Rights, establishing a system for individual complaints, by 95 States and the Second Optional Protocol to the same Covenant, abolishing the death penalty, by 40 States.

(Gap No. 3) *Substantive gap.* The application gap as to the circumstances becomes all the more serious when one takes note of the fact that situations of internal disturbance or violence that do not reach the threshold required for the applicability of international humanitarian law may, nevertheless, be invoked as constituting a public emergency that threatens the life of the nation and, hence, justifying derogation from international human rights law. Under article 4 of the Covenant on Civil and Political Rights, States that are faced with a public emergency, "may take measures derogating from their obligations under the present Covenant". Although article 4 itself introduces several safeguards in relation to derogation, the very institution of derogation seems to expose

human beings to a particular risk of human rights violations in a situation where the protection of international human rights law would be of essential value because of the non-applicability of international humanitarian law. The substantive gap caused by derogation is maybe the primary form of the "gray zone argument" that points towards the need for an established set of minimum humanitarian standards /fundamental standards of humanity.

(Gap No. 4) *Application gap as to the duty-bearers.* The fourth gap in the effective protection of fundamental standards of humanity is related to the fact that modern-day armed conflicts or violent disturbances very often involve one or more parties that are not controlled by the State and often do not have any organized leadership. Whereas Protocol II to the Geneva Convention is based on a certain symmetry between obligations and protection for the parties to an armed conflict that occurs between a government and an organized armed group acting under responsible command, disturbances that fall under the thresholds of Protocol II and Common Article 3 do not appear to provide an incentive to any of the parties for respect of fundamental standards of humanity. The non-state actors do not "win" any protection if they respect the principles of humanitarian law and government forces seem to have considerable latitude to operate, in particular if a state of emergency has been proclaimed.

4. ADDRESSING THE GAPS: OVERVIEW OF DEVELOPMENTS SINCE 1990, INCLUDING ONGOING PROCESSES

4.1. Derogation under human rights treaties

The substantive gap (Gap No. 3) is largely related to the fact that certain central human rights treaties, while essentially aiming at securing the applicability of human rights even in times of crisis, at the same time allow for derogation from many of their provisions, at least seemingly in many situations that do not reach the threshold for applying international humanitarian law.

Currently the Human Rights Committee is working on a future general comment on so-called non-derogable rights (alternatively: a general comment on all aspects of article 4 of the CCPR, replacing General Comment No. 5).[10] On the basis of a first draft prepared by the current

[10] Existing General Comment No. 5 (Thirteenth session, 1981) consists of only three paragraphs and, in addition to paraphrasing the text of CCPR article 4, is focussed on the

author in his capacity as a member of the Committee, the Committee held, in October 1999, its first round of general discussion.[11]

As the draft was distributed as a conference room document[12] and is not generally accessible, the text is reproduced below. The footnotes belong to the original draft, whereas new comments made in the context of the present document are indicated as separate paragraphs in italics.

[Insert: Draft General Comment on Article 4: Non-derogable rights under the CCPR]

1. Article 4 of the Covenant is of paramount importance for the system of protection for human rights under the Covenant. On the one hand, it allows for a State party unilaterally to derogate from a part of its obligations under the Covenant. On the other hand, article 4 subjects both this very measure of derogation, as well as its material consequences, to a specific regime of safeguards. In its General Comment No 5, adopted in the thirteenth session (1981), the Committee expressed its opinion in some issues related to article 4 of the Covenant, in particular the requirement of international notification of any derogation from the Covenant provisions and of the nature and extent of derogation in relation to each right. On that occasion, the Committee referred to the fact that no derogation is allowed, even in times of public emergency threatening the life of the nation, from certain rights.

2. Article 4 and the institution of derogation give rise to several other important issues of interpretation. This General Comment is limited to one of them, the question of what rights may be derogated from during a state of emergency that has been lawfully proclaimed. An equally important issue, dealt with neither in General Comment No. 5 nor the present General Comment, is what situations may under the terms of article 4 be classified as a state of emergency threatening the life of the nation. Consequently, the question whether certain rights that are subject to derogation according to the characterisation to be presented below are derogable only during some specific types of emergency situations will need to be addressed separately.

Comment: If the Committee were to choose the path of covering all aspects of article 4 in its future general comment, one important problem

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obligatiohs of official proclamation and international notification of a state of emergency. See UN doc. HRI/GEN/1/Rev.3 p. 6.

[11] UN doc. CCPR/C/SR.1797

[12] CCPR/C/66/R.8

to delve into is what types of crisis situations amount to a "public emergency that threatens the life of a nation" (article 4, para. 1) and whether different crisis situations that reach this threshold are to be treated differently in relation to the institution of derogation. In order to cover Gap No. 3 these questions are equally important as the discussion on non-derogable rights. For instance, one may assert that whereas a flood or earthquake give rise to a state of emergency, they can never legitimise derogation from freedom of expression, taking into account that article 19 itself authorises certain restrictions which should suffice even in specific circumstances created by a natural catastrophe. If this line of reasoning could be followed to a logical end, the conclusion might be that there is not much of a gap between circumstances that legitimise derogation from the CCPR and circumstances where common article 3 of the Geneva Conventions becomes applicable. In other words: although many types of crisis situations may constitute a public emergency that threatens the life of the nation, only armed conflicts of a certain degree of intensity suffice to justify derogating from rights (or certain of the rights) protected under the CCPR. Intuitively, the text of article 4 seems to suggest a different position on the level of acceptability of derogation as such. Nevertheless, at least in relation to certain of the "derogable" rights in the CCPR, the argument might have considerable merit.

3. The issue of which rights can be derogated from, and to which extent, cannot be separated from the provision in article 4, para. 1, of the Covenant according to which any measures derogating from a State party's obligations under the Covenant must be limited "to the extent strictly required by the exigencies of the situation". This condition requires that States parties provide careful justification not only for their decision to proclaim a state of emergency but also for any specific measures based on such a proclamation. The fact that some of the provisions of the Covenant have been listed in article 4, para. 2, as not being subject to derogation, does not mean that other Covenant rights could be subjected to derogations at will, even provided that a threat to the life of the nation exists. Derogation, in the overall framework of the Covenant, does not mean the "suspension" of certain rights altogether. The legal obligation to narrow down all derogations to those strictly required by the exigencies of the situation establishes both for States parties and for the Committee a duty to conduct a careful analysis under each article of the Covenant and based on a separate assessment of the actual situation. For instance, derogations from freedom of expression (article 19) and the requirement of periodic elections (article 25) will be subject to scrutiny by the Committee in all circumstances, albeit these provisions as such may be subject to legitimate derogations.

Comment: This paragraph has received criticism within the Human Rights Committee, primarily because of the notions of derogation and suspension, which distinction does not translate well into all languages. The main point behind the paragraph is, however, elsewhere, namely in establishing the role of the Committee in not only addressing the legitimacy of a proclamation of a state of emergency but in assessing, case by case, the concrete effect of any derogations.

4. Article 4, paragraph 2, of the Covenant explicitly prescribes that no derogation from the following articles may be made: article 6 (right to life), article 7 (prohibition of torture or cruel, inhuman or degrading punishment, or of medical or scientific experimentation without consent), article 8, paragraphs 1 and 2 (prohibition of slavery, slave-trade and servitude), article 11 (prohibition of imprisonment because of inability to fulfil a contractual obligation), article 15 (the principle of legality in the field of criminal law, i.e. the requirement of both criminal liability and punishment being limited to the law that was in place and applicable at the time the act or omission took place), article 16 (the recognition of everyone as a person before the law), and article 18 (freedom of thought, conscience and religion). The rights enshrined in these provisions must be classified as non-derogable by the very fact that they are listed in article 4, paragraph 2. The same applies, in relation to States that are parties to this instrument, for the undertaking, under the Second Optional Protocol to the Covenant, to altogether abolish the death penalty, as prescribed in article 6 of that Protocol. Conceptually, the qualification of a Covenant provision as a non-derogable one does not mean that no limitations or restrictions would ever be legitimate. The mentioning in article 4, paragraph 2, of article 18, a provision that includes a specific clause on restrictions in its paragraph 3, demonstrates that the acceptability of restrictions is separate from the issue of whether a human right or a dimension thereof is non-derogable. Even in times of most serious public emergencies, States that interfere with the freedom to manifest one's religion or belief must justify their actions by referring to the requirements specified in article 18, paragraph 3.

5. According to article 4, paragraph 1, one of the conditions for the legitimacy of any derogation from the Covenant is that the measures taken do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin. Even though article 26 or the other Covenant provisions related to non-discrimination (articles 2, 3, 14, paragraph 1, 23, paragraph 4, 24, paragraph 1, and 25) have not been listed among the non-derogable provisions in article 4, paragraph 2, the

right to non-discrimination is, indeed, a non-derogable right under the Covenant by virtue of and as far as mandated by article 4, paragraph 1. This is the case at least to the extent that any distinctions used in implementing the measures considered necessary during a state of emergency must comply with the core obligation of non-discrimination referred to in article 4, paragraph 1.

6. Furthermore, article 4, paragraph 1, requires that no measure derogating from the provisions of the Covenant may be inconsistent with the State party's other obligations under international law. Article 4 of the Covenant cannot authorise or legitimise any derogation from other international treaties a State is a party to. It is to be noted that many of the rights enshrined in the Covenant have been included in other human rights treaties or treaties on international humanitarian law, either in general or in relation to a specific situation or a specific group of persons. To the extent that such rights are non-derogable under the other treaties in question, article 4 of the Covenant cannot be read as justification for derogation from the Covenant if such derogation would entail a breach of the State's other international obligations. And where the obligations under human rights law or humanitarian law of a country are to be understood as falling into such parts of customary international law that are applicable even in times of emergency, a right to derogate from the Covenant cannot justify a breach of customary law obligations. The issue whether certain Covenant rights or certain aspects of them are covered by customary law depends on the contents and interpretation of customary international law itself.

7. As a consequence of the reference to other international obligations in article 4, para. 1, the Human Rights Committee does not acquire competence to authoritatively review the conduct of a State party under other treaties or under customary international law. Nevertheless, the Committee has a duty to take a State party's other international obligations into account when it considers whether the Covenant allows the State party to derogate from specific provisions of the Covenant. Therefore, when invoking their right to derogate from a provision of the Covenant under article 4, States parties should present information on their other international obligations relevant for the protection of the right in question.

Comment: Paragraphs 6 and 7 present the main argument of the draft and its effort to partly cover Gap No. 3. Even though many provisions of the Covenant have not been proclaimed as non-derogable, these "derogable" provisions include more specific rights or core areas where

other sources of international law result in a prohibition against derogation. Whereas the Human Rights Committee does not have an independent role in monitoring compliance with those other obligations, it must take them into account when addressing whether the Covenant authorises a derogation or not.

8. The list of non-derogable provisions in article 4, paragraph 2, together with the non-discrimination clause in article 4, paragraph 1, reflect the understanding of the international community, at the time of the drafting and adoption of the Covenant, of which of the Covenant provisions *as such* should be understood as non-derogable. The enumeration of non-derogable provisions in article 4 is related to, but not identical with, the question whether certain human rights obligations bear the nature of peremptory norms of international law.[13] As peremptory obligations of all States within the realm of human rights recognition has been given to the obligation to refrain from legitimising or encouraging slavery, slave trade and institutions and practices similar to slavery; obligation of states to refrain from genocide; obligation of states to refrain from torture and from other manifestly cruel, inhuman or degrading treatment or punishment; and obligation to refrain from mass extermination, arbitrary killings and summary executions. The proposed peremptory nature of the obligation of states to refrain from severe discrimination is supported by the non-discrimination clause in article 4, paragraph 1, of the Covenant. Areas where the category of peremptory international law may, through the reference to other international obligations in article 4, para. 1, add something to the enumeration of non-derogable rights in article 4 are the prohibition of the taking of hostages and of the imposition of collective punishments.

9. The Committee's General Comment No. 24 [52] on reservations relates to an issue separate from the classification of certain Covenant rights as non-derogable when it enumerates, without an effort to be exhaustive and without a contention that certain *provisions* of the Covenant would as such not be subject to reservations, which *rights* are not subject to reservation.[14] These findings of the Committee are relevant but in no way

[13] See, Lauri Hannikainen, *Peremptory Norms (Jus Cogens) in International Law*, Helsinki 1988.

[14] See, para. 8 of the General Comment. ("Accordingly, a State may not reserve the right to engage in slavery, to torture, to subject persons to cruel, inhuman or degrading treatment or punishment, to arbitrarily deprive persons of their lives, to arbitrarily arrest and detain persons, to deny freedom of thought, conscience and religion, to presume a person guilty unless he proves his innocence, to execute pregnant women or children, to permit the advocacy of national, racial or religious hatred, to deny to persons of marriageable age the right to marry,

automatically applicable in the assessment of what provisions of the Covenant, and to which extent, may permit derogation in times of public emergency threatening the life of a nation.

10. The Committee takes note of the international discussion on fundamental standards of humanity, applicable in all circumstances.[15] This discussion is based, *inter alia*, on earlier efforts to codify such standards.[16] Many of the rights mentioned in the discussion as rights to be protected in all situations are closely connected to the provisions mentioned as non-derogable in article 4, paragraph 2, of the Covenant. In addition, this discussion supports an opinion that by virtue of customary international law or treaties on humanitarian law, certain rights that find protection under the Covenant should be understood as binding in all circumstances.

11. One criterion for defining non-derogable rights, or non-derogable elements of rights, is the definition of certain human rights violations as international crimes. If certain action conducted under the authority of a State constitutes a basis for individual criminal responsibility for the persons involved in that action, article 4 of the Covenant cannot be used as a justification that a state of emergency exempted the State in question from responsibility in relation to the same conduct. Therefore, the recent codification of international crimes into the (Draft) Statute of the International Criminal Court is of relevance in the interpretation of article 4 of the Covenant.[17]

12. By way of example, in the following some situations are presented where it can be argued that international criminal law, customary

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or to deny to minorities the right to enjoy their own culture, profess their own religion, or use their own language. And while reservations to particular clauses of Article 14 may be acceptable, a general reservation to the right to a fair trial would not be.")

[15] See, E/CN.4/1999/92 (Report of the Secretary-General to the Commission on Human Rights, submitted pursuant to Commission resolution 1998/29)

[16] See, for instance the Paris Minimum Standards of Human Rights Norms in a State of Emergency (ILA), the Syracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights, the Final Report of Mr. Leandro Despouy, Special Rapporteur of the Sub-Commission, on the protection of human rights and states of emergency (E/CN.4/Sub.2/1997/19), Guiding Principles on Internal Displacement (E/CN.4/1998/53/add.2), the Turku (Åbo) Declaration of Minimum Humanitarian (1990; E/CN.4/1995/116). The International Criminal Tribunal for the Former Yugoslavia made reference to the Turku Declaration in the case Prosecutor v. Tadic (Decision of 2 October 1995, Case No. IT-94-1-AR-72).

[17] See, in particular, articles 5-8 of the Statute.

international law or humanitarian law must be seen to establish obligations that, as a State party's other international obligations, require that careful attention is paid by States parties and the Committee to whether a derogation from Covenant provisions not mentioned in article 4, para. 2, can be accepted.

Comment: The list of examples presented in paragraph 12 is by no means exhaustive, and it might be that some of the examples do not pass the muster of critical examination. It is meant to illustrate the consequences that flow from the preceding paragraphs. The language used in some of the examples might be too straightforward, as the position that certain types of derogations to, as such, "derogable" provisions are unlawful under article 4 can be expressed in another way than by simply proclaiming that there exists a "non-derogable right" under a "derogable provision".

a) All persons held in detention are entitled to respect for their person and honour. Although immediately linked to article 17 of the Covenant, which is not mentioned in article 4, paragraph 2, this right is intimately tied with articles 7, 16 and 18 of the Covenant, all mentioned in the said provision.

b) The non-derogable provision in article 15 of the Covenant expresses, besides the prohibition against retroactive punishment, also the more general requirement of legality in the field of criminal law, thus affecting the application of article 14 in times of emergency.

c) The taking of hostages, enforced disappearances, abductions or unacknowledged detention are related to the prohibition of arbitrary detention in article 9, paragraph 1 of the Covenant. The non-derogable nature of this prohibition is justified by its intimate connection to the non-deroagble provision in article 7 of the Covenant. The extreme forms of arbitrary detention just mentioned emphasize that protection against such human rights violations can be secured only through prohibiting arbitrary detention under all circumstances.

d) The Committee is of the opinion that the international protection of the rights of, respectively, children and minorities includes non-derogable elements. As for members of minorities, the Committee has in its General Comment No. 24 [52] stated that denying to minorities the right to enjoy their own culture, profess their own religion or use their own language would violate customary international law and cannot, hence, be subject to reservations under the Covenant. Under the same token, derogation

from the same rights in times of emergency is legitimate only to the extent acceptable under customary international law. The non-derogable dimension of article 27 of the Covenant could be formulated as an obligation to make, in observing minimum humanitarian standards applicable in all circumstances, all efforts to protect the rights of groups, minorities and peoples, including their dignity and identity. The Committee takes note of the fact that the Convention on the Rights of the Child, ratified by almost all States parties to the Covenant, does not include a derogation clause. As certain provisions of the Convention clearly indicate that the Convention is meant to be applicable in emergency situations,[18] this supports a conclusion that the Convention is meant to be applicable even in times of crisis. Therefore, even when a measure would be a legitimate derogation under the Covenant, it must also be an acceptable restriction under the Convention of the Rights of the Child in order to meet the test under article 4, para. 1.

e) In the opinion of the Committee, certain rights related to article 12 of the Covenant belong to fundamental standards of humanity applicable in all situations. These rights relate to protection against the displacement of the population or parts thereof, the prohibition against compelling persons to leave their territory, and the requirement of judicial safeguards against assigned residence.[19] Although article 12 of the Covenant is not mentioned as a non-derogable provision in article 4, paragraph 2, of the Covenant, the Committee is of the opinion that humanitarian law, international criminal law and customary international law, together with a prohibition against punishments not based on the law, covered by the non-derogable provision in article 15 of the Covenant, supports the non-derogable nature of the said dimensions of the freedom of movement.

13. Article 2, paragraph 3, of the Covenant requires that there shall be effective domestic remedies to deal with any violations of the Covenant. Although this clause is not mentioned in the list of non-derogable provisions in article 4, paragraph 2, it can be understood as non-derogable. The obligation to provide effective domestic remedies for violations of the Covenant is intimately tied with the other provisions of Part II of the Covenant, establishing the general framework for the functioning of the human rights defined in Part III of the Covenant. The reference in article 4, paragraph 1, to the authority of a State party to derogate from "their obligations under the present Covenant" is to be

[18] See, article 38 of the Convention.

[19] See, articles 7 (1) (d), 7 (2) (d) and 8 (2) (e) (viii) of the Draft Statute of the International Criminal Court.

understood to refer to Part III. The list of non-derogable provisions in article 4, paragraph 2, includes only provisions of Part III and not, for instance, article 4 itself. Similarly to the State obligations under article 4 itself, the other provisions in Part II of the Covenant are not subject to derogation under article 4. The same applies to the reporting obligations under article 40. For those State parties that have ratified the (first) Optional Protocol to the Covenant, also the international recourse provided by the Protocol is non-derogable in times of public emergency. Although States might legitimately introduce, during a state of emergency, certain adjustments to the practical functioning of their systems of judicial and other remedies, they may not derogate from the fundamental obligation under article 2, paragraph 3, to provide for an effective remedy.

14. Some of the substantive rights explicitly recognised as non-derogable in article 4, paragraph 2, include a dimension of procedural protection. Notably, article 6 on the right to life establishes far-reaching and non-derogable procedural guarantees in relation to any imposition of the death penalty. It is evident that a denial of access to court or to other effective procedural guarantees in relation to other non-derogable rights would have such effect on the enjoyment of the rights in question that the non-derogable nature of the right would be violated. Hence, it is legitimate to infer that procedural rights linked to the enjoyment of or to alleged violations of human rights that are to be considered to be non-derogable either under article 4, paragraph 2, or due to the non-discrimination clause or the reference to other international obligations in article 4, paragraph 1, are also non-derogable. This implies that the right to a fair trial (article 14) and the right to judicial review of any deprivation of liberty (article 9) are non-derogable with respect to all cases related to other non-derogable rights. As the right to judicial review of any deprivation of liberty is intimately tied with the protection against torture or cruel, inhuman or degrading treatment or punishment under article 7 which is non-derogable under article 4, paragraph 2, it follows that this right, protected in article 9, should be understood as not allowing for derogation under any circumstances.[20]

[20] See, the Committee's Concluding Observations on Israel, 1998, para 21: "... The Committee considers the present application of administrative detention to be incompatible with articles 7 and 16 of the Covenant, neither of which allows for derogation in times of public emergency. The Committee takes due note that Israel has derogated from article 9 of the Covenant. The Committee stresses, however, that a State party may not depart from the requirement of effective judicial review of detention."

Comment: Of the concrete examples given in the draft general comment, this is perhaps the most important one. At the same time, it is the one that has the strongest basis in the Committee's earlier pronouncements. Besides the example given in footnote no. 17, the Committee has taken this position in its negative response to the Sub-Commission concerning the need for a third optional protocol on non-derogable procedural rights. See, UN doc. A/49/40, Supplement No. 40, vol. I, annex XI, para. 2-4. In short, the Committee expressed its opinion that the remedies provided in article 9, paragraphs 3 and 4 read in conjunction with article 2 are inherent to the Covenant as a whole, and pointed to the risk that the proposed optional protocol "might implicitly invite States Parties to feel free to derogate from the provisions of article 9 of the Covenant if they do not ratify the proposed optional protocol".

15. The same generalising conclusion does not appear necessary under article 14. A State may invoke a public emergency threatening the life of a nation to justify adjustments in the organisation and operation of its judicial system, including access to court in certain civil and administrative matters that during normal times are dealt with by courts of law. As long as the State party complies with its obligations to provide effective remedies under article 2, paragraph 3, access to a court of law does not appear to be generally a non-derogable right. From the non-derogable nature of article 15, however, it can be inferred that the right to be tried by a court of law, and not by for instance military or administrative authorities, *in any criminal matter*, is non-derogable and that all the safeguards in article 14 must be complied with in criminal law cases during a state of emergency.[21] In instances where a State party, during a state of emergency, *does provide* access to court in other than criminal matters, the fundamental obligation to provide a fair trial under article 14, paragraph 1, cannot be derogated from. Any compromise of the requirement that a court of law must respect the right to a fair trial would amount to a denial of the non-derogable right to an effective remedy under article 2, paragraph 3.

[end of insert]

The work of the Human Rights Committee towards a new general comment on article 4 of the Covenant deserves attention as a major possibility to cover the so-called substantive gap (Gap No. 3) based on

[21] Treaties on humanitarian law support this conclusion, as well as the Draft Statute of the International Criminal Court, in which it is defined as a war crime to wilfully deprive a prisoner of war or other protected person of the rights of fair and regular trial, see art. 8 (2) (vi).

the assertion that major human rights treaties, including the CCPR, leave too much scope for derogations in times of emergency. Through the development of human rights law in the area of derogations it might, in the long run, be concluded that the substantive gap related to derogations is, to a large extent, an optical delusion. Several conditions, all delimiting the seemingly wide latitude left by article 4 to States parties, would have to be met before this stage could be reached: (a) It should be established by the Human Rights Committee and widely recognised by the international community that the requirement of limiting any derogations to the exigencies strictly required by the specific emergency situation narrow down both the scope of rights subject to derogation in a specific crisis situation and the concrete dimensions of derogations that affect each right. (b) The interpretation of any individual provision of the Covenant should be established through a high degree of interdependence between "non-derogable" and "derogable" provisions. (c) The influence of other obligations under international law should also be recognised as narrowing down derogation powers under the Covenant.

In order to become effective, such a regime would need to be tested and endorsed through immediate, regular and coherent monitoring of any derogations resorted to during states of emergency. In order to achieve this, the Human Rights Committee should, besides adopting a general comment on article 4, create procedures to deal with states of emergency. Such measures might include

- the appointment of one member of the Committee as special rapporteur on states of emergency, with a mandate to initiate the Committee's mechanism designed to deal with states of emergency (see below);
- a mechanism designed to ensure that both formal declarations of a state of emergency (CCPR art. 4, para. 3) and such *de facto* emergencies that might involve derogation from the Covenant, lead to a request for a special report under article 40 of the Covenant; and
- the fast-tracking of such individual communications that are related to states of emergency or derogations.

Needless to say, the two latter measures would require substantive improvements in the now appalling resources of the Human Rights Committee. In principle, this could be achieved by strengthening the Committee's secretariat within the Office of the High Commissioner or by creating an external institution for providing specific services to the Committee and its Secretariat, either in general or specifically in relation to states of emergency and derogations.

4.2. Progress in ratifications of international treaties

The ratification gap (Gap No. 2) is gradually diminishing. The ratification of the four Geneva Conventions as well as one of the human rights treaties, the Convention of the Rights of the Child, is close to universal. As already these treaties cover quite well the substantive norms of fundamental standards of humanity, the somewhat lower numbers under the 1977 Protocol I to the Geneva Conventions and some of the human rights treaties are not, as such, alarming. The still lower degree of ratifications of Protocol II to the Geneva Conventions, however, points towards the application gap as to the circumstances (Gap No. 1) because of the importance of that specific instrument in addressing non-international armed conflicts.

The number of ratifications of the four Geneva Conventions and their Porotocols are:[22]

Geneva Conventions I-IV	188
Protocol I	158
Protocol II	149

The number of ratifications of universal human rights treaties grew relatively rapidly in the 1990s. According to a report by the Office of the High Commissioner for Human Rights, the number of ratifications under relevant UN human rights treaties were, on 19 January 2000, the following:

Convention against Torture	118
Convention on Economic, Social and Cultural Rights	142
Covenant on Civil and Political Rights[23]	144
(First) Optional Protocol	95
Second Optional Protocol	40
Convention for the Elimination of Racial Discrimination	155
Convention on the Elimin. of Discrimination against Women	165
Convention on the Rights of the Child	191

[22] ICRC database on International Humanitarian Law <http://www.icrc.org/ihl>

[23] The figure given by the OCHR does not include Kazakhstan which according to the Human Rights Committee is a party to the Covenant on the basis of continuity of obligations in the instance of succession. See UN Doc. A/54/40, Supplement 40, Annex I. In assition, the Covenant continues to apply in Hong Kong and Macau despite the fact that the People's Republic of China is yet to ratify the CCPR.

The adoption of a new Convention or Protocol that would seek to strengthen the status of fundamental standards of humanity in the form of a binding treaty would open the ratification gap in a new form: To what extent is there a risk that some States would refer to the new instrument as proof for their position that the norms included in the new instrument would be binding only to those States that ratify the treaty? Of course this risk could be anticipated by formulating the new instrument in a way that indicates its nature more as a codification of existing legal norms than as establishing new norms of international law. Nevertheless, the risk is a real one and might arise already when a process towards a legally binding instrument on fundamental standards of humanity is initiated.

Consequently, the problem of a ratification gap (Gap No. 2) speaks *against* trying to achieve such an international instrument on fundamental standards of humanity that would require ratification by States.

4.3. Developments in the field of customary humanitarian law

The category of customary international law is important in addressing two serious gaps identified in the debate on fundamental standards of humanity.

First, customary norms of international law might cover some of the seeming substantive gaps in treaty law (Gap No. 3). If, for instance customary international law is understood to contain norms that protect certain elements of rights that *prima facie* are subject to derogation under the CCPR, then these customary norms fall under the reference to "other obligations under international law" in article 4, para. 1, of the CCPR. Consequently, such norms restrict the possibility of States to make use of their power to derogate from the CCPR during a state of emergency. The above discussion of the work by the Human Rights Committee towards a general comment on non-derogable rights illustrates this point.

Secondly, customary international law helps to overcome the ratification gap (Gap No. 2). In order to address the obligations of a given State in relation to fundamental rights of the individual during a crisis situation, it is not necessary to limit the study to the list of international treaties ratified by that country. Where a country's ratification record is incomplete, customary international law can help to fill in the gap.

There are, however, at least three problems in trying to address the existence of "gaps" through relying on customary international law. They

relate to (1) the identification of norms of customary international law, (2) the nature and classification of such norms, and (3) the problem of the addressees of customary international law.

(1) The identification problem

The emergence and identification of customary international law is a complicated process. While it is obvious that many provisions in treaties on international humanitarian law have their origin in the law of custom, and even make reference to this fact,[24] an effort to produce even a close-to-exhaustive list of norms of international humanitarian law that have the nature of customary international law is difficult and time-consuming. The 26th International Conference of the Red Cross and Red Crescent (1995) assigned the ICRC the task of preparing, with the assistance of legal experts representing various geographical regions and legal systems, a report on the customary rules of international humanitarian law, applicable in international and non-international armed conflicts. This work, which certainly will be of great value for the project on fundamental standards of humanity, is still under its way.

According to a brief public description of the ongoing ICRC project, the starting point of the study is that treaty law on humanitarian law rules is well developed in relation to international conflicts but far from complete in relation to non-international armed conflicts.[25] One major part of the identification of norms of customary humanitarian law has been done by starting from the assumption that the rules of the 1949 Geneva Conventions represent customary international law.[26]

(2) The classification problem

The second problem related to efforts to base the binding nature of fundamental standards of humanity on their validity as norms of customary international law is the fact that there is no automatic link

[24] The ICRC database on international humanitarian law includes "customary international law" as one of its keywords. Under the keyword, the database gives about two dozens of references to international documents (treaties and texts) or specific treaty provisions (aritcles), mostly based on the mentioning of the word "custom" or "customary" in the document itself. See http://www.icrc.org/ihl.nsf/.

[25] Jean-Marie Henckaerts, "Study on Customary Rules of International Humanitarian Law: Purpose, Coverage and Methodology", International Review of the Red Cross, vol. 81 (1999): 660-667 p. 660-661

[26] Henckaerts, p. 663. See, also, Theodore Meron, The Geneva Conventions as Customary Law, AJIL 81 (1987) p. 348-370; Theodore Meron, Human Rights and Humanitarian Norms as Customary Law, Oxford University Press 1989.

between the fact that a norm belongs to customary international law and its classification as a *peremptory* norm. Customary law allows, within certain limits, for persistent objection and for the possibility of States to conclude treaties that modify norms of customary law. Much work has been done to identify peremptory norms (*jus cogens*) that in substance are related to the project of fundamental standards of humanity.[27] Nevertheless, it is necessary to remind that the classification of a norm as belonging to customary international law is not sufficient as such but will in any event require further classification before the unconditionally binding nature of the norm can be determined.

(3) The problem of the addressees

The most serious reason why the category of customary international law does not appear to provide a solution to all the problems identified in the discussion on fundamental standards of humanity, is the fact that customary international law is State-centred in nature. Where modern treaty law has given rise to various supranational, regional or even "constitutional" structures that include a shift from a system of law based on *consent* by States towards a system of *objective* norms, customary international law still represents the long tradition of general international law and is, hence, even more State-centred than treaty law. The move from the notion of the Law of Nations (folkrätt) to International Law (internationell rätt) entails a paradigm shift as to the addressees of the norms. Where the former deals with rights and obligations of the traditional subjects of international law in relation to each other (read: States), the latter represents a development towards a more complex system of right-holders and duty-bearers.

Consequently, one may doubt whether efforts to fill the existing gaps in treaty law with reference to customary international law will be useful in addressing the application gap related to the duty-bearers and in particular non-State actors (Gap No. 4). For instance, the ICRC study on customary rules of international humanitarian law appears, judged on the basis what exists in the public domain, to focus on rules binding upon all *States*, even though it seeks to identify norms that are applicable in non-international conflicts.[28]

[27] Lauri Hannikainen, Peremptory Norms (Jus Cogens) in International Law. Historical Development, Criteria, Present Status, in particular, pp. 425-520 and 596-715. Helsinki 1988.
[28] According to Henckaerts (p. 661), a study on customary law is seen as particularly useful in addressing the gaps of existing treaties in addressing non-international conflicts: "Additional treaty law would not easily fill this gap because it would be extremely difficult and time-consuming to have States adopt a new treaty on non-international conflicts which would still need States' ratification to enter into force." Furthermore, in the discussion of the usefulness

Somewhat paradoxically, one advantage of treaty law is that at least in many States there are written or unwritten constitutional norms about the domestic implementation of international treaties. An international treaty that clearly seeks to establish a set of objective norms that will be binding not only on the State and its authorities but also on various kinds of non-State actors, will in many countries be implemented through specific legislation that extend and convert the original international obligation of the State to domestic law obligations of all parties. One form of such legislation is criminal law.

The difference between treaty law and customary law is not necessarily great on this point. Some (but fewer) constitutions authorize, explicitly or implicitly, the domestic applicability of norms of customary international law. Even in other cases it is quite possible that the measures States take to implement their obligations under international law cover not only treaties ratified by that State but also norms of customary international law. Specifically, in the field of crimes committed during armed conflicts, domestic criminal law relatively often covers violations of customary international law.[29] Naturally, in some non-international armed conflicts the other party to the conflict with government forces might deny the legitimacy or validity of such legislation. In spite of such denial one can speak of legal obligations enforceable in relation to non-State actors through, for instance, courts of law, as long as there are State institutions that exercise effective control and jurisdiction.

4.4. Accountability of Non-State Actors

The last part of our discussion on the "statist" nature of customary international law brings us directly to the next major issue: the application gap in relation to armed groups and other non-State actors (Gap No. 4). For reasons presented above, new international treaties or the identification of customary rules of international humanitarian law are not likely to succeed in filling this specific gap. Even if all governments in the world adopted and ratified a legally binding treaty that seeks to extend the human rights and humanitarian law obligations of States to

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of a study on customary rules Henckaerts refers to the fact that "Rules of customary international law apply to all States".

[29] For instance in Finland, the criminalisation of illegal methods of warfare includes a reference to customary international law in the definition of the crime: "... or otherwise breaches against ... laws or customs of war generally recognised and established under international law ..." (Chapter 11, Section 1 of the Criminal Code as amended in 1995).

various non-State actors, it would still be a treaty between States. Hence, it would be of questionable validity and legitimacy in relation to others than States as its duty-bearers. Of course many States would take measures to implement the treaty in their domestic law so that the obligations of non-State actors become operative. But even in this case, the true applicability of such accountability would flow from the efficiency and legitimacy of domestic law.

There are three dimensions under which efforts to make non-State actors accountable in relation to fundamental standards of humanity do make sense. Two of them could be called the stick and the carrot, and the third one, to be described first, uses State responsibility as a vehicle for promoting respect for human rights by non-State actors.

(1) State responsibility as a vehicle

Under existing human rights treaties, States have undertaken to respect and ensure the rights enshrined in the instrument in question. The discussion about "accountability" of non-State actors should not blur the fact that States are, to a large extent, responsible under international law for what happens in their territory. States must take effective measures to protect human rights, even when the immediate threat comes from non-State actors. If States fail to comply with this duty with "due diligence", they are themselves guilty of violating human rights.

State responsibility under human rights treaties extends to situations where internal violence, be it directly attributable to State authorities or not, results in disappearances or killings. The leading case in the issue is the 1988 judgment by the Inter-American Court of Human Rights in the *Velásquez Rodrigues* case, involving the "disappearance" of an individual. The basis for State responsibility was expressed in the following terms:

"Thus, in principle, any violation of rights recognized by the Convention carried out by an act of public authority or by persons who use their position of authority is imputable to the State. However, this does not define all the circumstances in which a State is obligated to prevent, investigate and punish human rights violations, nor all the cases in which the State might be found responsible for an infringement of those rights. An illegal act which violates human rights and which is initially not directly imputable to a State (for example, because it is the act of a private person or because the person responsible has not been identified) can lead to international responsibility of the State, not because of the act

itself, but because of the lack of *due diligence* to prevent the violation or to respond to it as required by the Convention."[30]

The Court concluded by finding a violation of articles 7 (right to personal liberty), 5 (right to humane treatment) and 4 (right to life), all in conjunction with the general obligation to respect Convention rights (article 1).

The Human Rights Committee, in turn, has taken a similar position in the case *Delgado Paez v. Colombia* which was related to threats against a teacher and advocate of "liberation theology". The Committee found a violation of the right to security, protected together with liberty in article 9 of the Covenant. Although there had been an objective need for the author to be provided by the State with protective measures, "the State party has not taken, or has been unable to take, appropriate measures to ensure Mr. Delgado's right to security of the person".[31]

In the case of *Osman v. United Kingdom*,[32] based on the alleged failure by public authorities to prevent an individual from deliberately killing the applicant's husband, the European Court of Human Rights can be said to have associated itself with the *due diligence* jurisprudence of the Inter-American Court of Human Rights and the Human Rights Committee. Although no violation of article 2 (right to life) was found, the Court established a standard for positive State obligations under this provision:

"115. The Court notes that the first sentence of Article 2 § 1 enjoins the State not only to refrain from the intentional and unlawful taking of life, but also to take appropriate steps to safeguard the lives of those within its jurisdiction ... It is common ground that the State's obligation in this respect extends beyond its primary duty to secure the right to life by putting in place effective criminal-law provisions to deter the commission of offences against the person backed up by law-enforcement machinery for the prevention, suppression and sanctioning of breaches of such provisions. It is thus accepted by those appearing before the Court that Article 2 of the Convention may also imply in certain well-defined

[30] *Velásquez Rodrigues v. Honduras*, Judgment of 29 July 1988, Inter-American Court of Human Rights, Series C, No. 4, para 172 (emphasis added).

[31] *Delgado Paez v. Colombia* (Communication 195/1985), Report of the Human Rights Committee 1990, volume II p. 43 (UN document A/45/40), para 5.6.

[32] *Osman v. United Kingdom*, Judgment of 28 October 1998, European Court of Human Rights, Reports 1998-VIII.

circumstances a positive obligation on the authorities to take preventive operational measures to protect an individual whose life is at risk from the criminal acts of another individual."

(2) Offering the carrot: making it attractive for non-State actors to respect human rights

Brief reference was already made to the fact that the dimensions where international humanitarian law is successful in engaging the responsibility of other than government-controlled military forces are related to the benefits such armed groups can expect for being recognised as a party to an armed conflict.

The International Council on Human Rights Policy has prepared a highly pertinent and interesting draft report on the accountability of armed groups.[33] As the document will be distributed to the participants of the Stockholm Expert Meeting, there is no need to summarise the report here. Some comments, however, seem to be at place to illustrate the relationship between the ICHRP study and the project on fundamental standards of humanity.

One of the dimensions that deserve close attention in the ICHRP study is the deliberate and systematic effort to engage into developing "non-legal" methods to influence armed groups so that they would respect human rights and humanitarian law. In the 70-page report, the section on legal issues comprises five and a half pages,[34] whereas the approaches of "shaming (and persuasion)"[35] and "working with armed groups"[36] are given fourteen pages. For such an approach a soft law document, like the Turku Declaration or a future Declaration on Fundamental Standards of Humanity, might be as useful as a binding international treaty between States. As a pedagogical tool, designed to be used in training and convincing leaders and members of non-State armed groups of the existence and substance of fundamental standards of humanity to be respected by everyone and in all circumstances, a document *not* originating explicitly from the will and consent of States and *not* primarily addressed to States might actually be *more* useful than an international treaty. Perhaps the Turku Declaration is too brief to serve as a proper pedagogical tool for this purpose but it can well be used as an

[33] Ends & Means: Human rights approaches to armed groups. Draft report for consultation. December 1999.
[34] paras. 236-258
[35] paras. 159-194
[36] paras. 195-215

illustration: maybe an expanded Turku Declaration accompanied by a commentary section is what the ICHRP approach of "working with armed groups" might require?[37]

Another contribution by the ICHRP study to the project on fundamental standards of humanity is in the identification of "human rights abuses"[38] often committed by non-State armed groups. The study includes a concise list of "some of the most common human rights abuses attributed to armed groups".[39] This catalogue can serve as a checklist for discussing whether the Turku Declaration or any future document aimed at codifying fundamental standards of humanity is capable of addressing the rights that are jeopardized particularly by non-State armed groups. In this sense the ICHRP study is relevant not only in relation to Gap No. 4 but also Gap No. 3 (the substantive gap). Below, a rough comparison is given as an illustration:

Human rights abuses identified in the ICHRP report	**Provisions of the Turku Declaration**
Arbitraty deprivation of the right to life	3 (2) a, d and f; 5; 8
Disregarc for the protection owed to civilians caught up in a confilct	3 (2) e; 5; 12; 14; 15
Interference with freedom of movement	7; 11
Interference with freedom of expr-ession, assembly and association	
Torture, ill-treatment	3 (2) a; 4; 6

[37] Reference is made to the section "Developing codes of conduct" in the ICHRP report (paras. 206-212).

[38] In para. 28 of the ICHRP report, human rights abuses are defined as "conduct or practices that clearly infringe standards of international law" (standards of international human rights law and/or international humanitarian law). This definition might require elaboration, since one may ask whether conduct or practice can "infringe" international law if its actor is not a subject of international law. Perhaps one should start from the beneficiaries (human beings) and define human rights abuses as conduct or practice that prevents individuals from the effective enjoyment of their rights enshrined in the normative framework of international human rights law and/or international humanitarian law.

[39] para. 33

Abuses against children	10
Abuses against women	3 (2) a
Arbitrary deprivation of liberty and due process	3 (2) c and d; 4; 9

In general, the degree of correspondence is high. The Turku Declaration seems to address human rights abuses commonly attributable to armed groups. Judging on the basis of the ICHRP report there is, however, at least one clear omission in the Turku Declaration: the absence of any reference to classical political rights (freedom of expression, freedom of assembly, freedom of association)[40] in this instrument. This might be an indication of the Turku Declaration being too much directed by a standard reading of the existing body of law and not fully taking into account the real threats to human rights, in particular when such threats come from the side of non-State armed groups. Apparently the drafters of the Turku Declaration have simply assumed that political rights are subject to derogation in times of crisis.[41]

Also on other occasions the ICHRP report rightly takes up the question of furthering *discussion and tolerance* as means to prevent human rights abuses by armed groups.[42] Likewise, freedom of expression, assembly and association need more effective protection in relation to States in times of crisis, if efforts aimed at protecting fundamental standards of humanity through greater awareness of such standards are to prove successful.

(3) Using the stick: individual criminal responsibility

While the two approaches to armed groups briefly described above deserve attention, it must be made clear that one of the main developments of the 1990s in promoting fundamental standards of humanity, if not the main development, is the still ongoing process of strengthening international criminal law.

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[40] Under this heading, the ICHRP report gives the following specifications of likely human rights abuses: "Preventing independent organisations from operating, banning meetings and gatherings, using fear and intimidation to silence critics, denying journalists access to areas, closing independent media, using media to spread hatred or to incite violence" .

[41] Similarly, the HRC draft general comment on non-derogable rights includes no indication that some elements of articles 19 to 22 of the ICCPR might be non-derogable.

[42] See, for instance, paras. 258 and 265 of the ICHRP report.

Since the Nuremberg and Tokyo trials it has been clear that international law allows, and calls for, individual criminal responsibility for certain acts that violate fundamental standards of humanity. Persons operate under individual criminal responsibility for their actions, including actions that take the form of giving or obeying orders. The Genocide Convention, the grave breaches provisions in the Geneva Conventions and the references to international criminal responsibility in general human rights treaties all have contributed to an understanding of the basic rules of responsibility for war crimes and crimes against humanity. Through their provisions on penal sanctions and universal jurisdiction the Geneva Conventions apply the approach of "the stick" to all persons who commit grave breaches against the rules of international humanitarian law. It is to a large extent through these provisions that treaties between States are transformed to obligations of non-State actors – with the help of domestic law as a device, it must be added.

In later years, the Convention against Torture and the establishment of the International Criminal Tribunals for Former Yugoslavia and Rwanda have further developed the normative framework. The operation of the said tribunals, together with a growing jurisprudence of domestic courts applying the principle of universal jurisdiction in relation to torture, war crimes or crimes against humanity, all contribute towards making individual criminal responsibility a reality. One specific advantage of the universal jurisdiction approach is its capability of enforcing fundamental standards of humanity through a functioning judicial system but not necessarily relying on the courts of the State where the conflict takes place.[43] This adds both to the efficiency and to the legitimacy of criminal responsibility, in particular where effective State control is lacking.

Furthermore, the Draft Statute of the International Criminal Court represents a major breakthrough in the contribution of international criminal law to the project on fundamental standards of humanity. Instead of applying the model of the Geneva Conventions, where an international treaty authorises and obliges its States parties to enact and enforce legislation on individual criminal responsibility, the ICC Statute represents genuine international criminal law. The crimes, the punishments and the competent court are defined in the treaty itself, and there are several alternative grounds for bringing an individual under the

[43] The Committee on Human Rights Law and Practice of the International Law Association presented at the 1998 ILA Conference in Taipei an interim report on universal jurisdiction in respect of gross human rights offences, see Report of the Sixty-Eighth ILA Conference, pp. 563-576. Currently the Committee is preparing its final report on the subject to the year 2000 ILA Conference to be held in London.

jurisdiction of the Court. For instance, it is *not* decisive if the State of his nationality has not ratified the ICC Statute. Without going into other details it needs to be mentioned that under the ICC Statute war crimes committed in non-international armed conflict are subject to the jurisdiction of the Court also when the conflict occurs *between* organized armed groups not subject to government control.[44]

4.5. Developments in international criminal law

The rapid development of international criminal law in the 1990s has much more relevance for the project on fundamental standards of humanity than its role in providing a major part of the answer in respect of non-State actors, and hence the application gap as to the duty-bearers (Gap No. 4). The elaboration and application of the Statutes for the international criminal tribunals for Rwanda and former Yugoslavia represent a substantive development in international law, by specifying the constitutive elements of international crimes based on international law. Although the application of international criminal law is directly related to individual perpetrators it also clarifies what are the substantive norms of international law calling for individual criminal responsibility. What is punishable for an individual under international law is also prohibited in relation to States. And what is prohibited by international law by qualifying certain acts as international crimes is certainly relevant for an understanding what *rights* – fundamental standards of humanity – must be respected by States and individuals in all circumstances.

Some of the provisions in the ICC Statute are explicit in addressing individual criminal responsibility for acts committed in another capacity than that of a State agent. Article 7, paragraph 2 (e) refers to "State or organizational policy" in defining crimes against humanity. Parts of article 8 (war crimes) are applicable in armed conflicts not of an international character, and paragraph 2 (f) specifically refers to "protracted armed conflict between governmental authorities and organized armed groups or between such groups".

Through the reasoning used above to identify generally binding norms of international law on the basis of what is punishable for individuals as international law, international criminal law helps to address and fill in the substantive gap (Gap No. 3). It is to be noted that the draft HRC General Comment on non-derogable rights already makes certain

[44] ICC Statute, article 8 (2) (f).

references to the ICC Statute in its reasoning why certain elements of rights *not* listed among non-derogable provisions in ICCPR article 4, para. 2, must be respected in all circumstances.[45] In particular, the norms related to forced displacement in the Turku Declaration (article 7) and in the Guiding Principles on Internal Displacement receive, through the ICC Statute, much support as expressing legally binding norms of international law.

The Draft ICC Statute is relevant also in relation to the application gap as to the circumstances (Gap No. 1), maybe more in demonstrating a potential than actually filling in the gap. Article 6 of the ICC Statute, defining the crime of genocide, does not include any particular threshold of applicability, e.g. by requiring the existence of an armed conflict. This is, of course, in line with article I of the Genocide Convention which refers to times of war and times of peace. Many of the forms of genocide, as defined in article 6 of the ICC Statute, entail the use of grave physical violence. Items c, d, and e, however, are not necessarily related to reaching a "threshold" that would make international humanitarian law applicable.[46] Article 6 of the ICC Statute is not "new" in the sense that it closely follows article II of the Genocide Convention.

Article 7 of the ICC Statute (Crimes against humanity) follows the threshold approach by defining the crimes in question as certain acts "committed as part of a widespread or systematic attack directed against any civilian population". Paragraph 2 (a) of the provision, however, shows that all such "attacks" are not necessarily armed conflicts. This provision defines as an attack directed against any civilian population "course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack". Many of the acts listed in paragraph 1 do not conceptually require the existence of an armed conflict or other intensive physical violence: for instance enslavement (b), deportation or forcible transfer of population (c), or apartheid (j).

Article 8 (war crimes), in turn, clearly follows the threshold approach and requires the existence of an armed conflict. Paragraphs 2 (c) and 2 (e) apply to acts committed during an armed conflict not of an international

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[45] See footnote No. 19 above.

[46] Art. 6 (c) defines as genocide the deliberate infliction on a group conditions of life calculated to bring about its physical destruction, art. 6 (d) covers measures intended to prevent births within a group and art. 6 (e) is about the forcible transfer of children of the group to another group.

character, and paragraphs 2 (d) and 2 (f) exclude from the scope of such a conflict "situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of similar nature". At the same time, paragraph 2 (f), already quoted above, makes clear that the existence of a conflict not of an international character does not require that any of the parties to such a conflict operate under governmental command.

Taken together, articles 6 to 8 demonstrate the potential of international criminal law to clarify and modify the rules of international law that bring about the application gap as to the circumstances (Gap No. 1) related to the threshold of applying international humanitarian law.

Finally, the provisions on the jurisdiction of the Court in the ICC Statute demonstrate that international criminal law is capable of addressing the ratification gap (Gap No. 2). Article 12 of the ICC Statute provide for several alternative grounds for the jurisdiction of the Court in respect of international crimes:

- ratification of the ICC Statute by the territorial State;
- ratification of the ICC Statute by the State whose national the perpetrator is, irrespective of where the crime was committed; or
- a declaration by a non-ratifying State on the acceptance of the jurisdiction of the Court in relation to its territory and nationals.

Taken together, these alternative preconditions for the existence of the Court's jurisdiction modify the role of the ratification gap. Of course, ratifications by States remain relevant for the entry into force of the ICC Statute[47] and for the existence and exercise[48] of the Court's jurisdiction in relation to specific acts. However, the ICC Statute makes clear that no State can, by deciding not to ratify, effectively protect its nationals against prosecution for international crimes committed in another State.

In conclusion, it can be stated that the development of international criminal law is capable of addressing *all four* gaps identified above in Section 3 of this paper. In particular, this conclusion relates to the (Draft) ICC Statute. In the same breath, however, it must be pointed out that even after the entry into force of the ICC Statute international criminal law will be able to address only some of the substantive norms characterized as belonging to fundamental standards of humanity. Hence, also its ability to fill in the other gaps are limited to the same substantive norms. In

[47] See article 126 of the ICC Statute.
[48] See, article 13.

principle the further elaboration of international criminal law to include new violations of fundamental standards of humanity could be a solution. There are, however, both reasons of principle (the *ultima ratio* role of criminal law) and practical reasons (political obstacles) against putting too much emphasis on this approach.

4.6. Developments parallel to the Turku Declaration: Internal Displacement and Population Transfers

The Turku Declaration is by no means unique in trying to identify and tackle, by way of a soft law type of document, the gaps that at least seemingly make it difficult for international human rights law and international humanitarian law to address all aspects of fundamental standards of humanity in times of crisis. Particularly in the field of article 7 of the Turku Declaration, related to freedom of movement and displacement of populations, there have been parallel efforts in the 1990s. To the extent these efforts seek to clarify binding norms of international law applicable at times of crisis, they contribute towards overcoming the substantive gap (Gap No. 3), possibly also dimensions of the other gaps.

With his 1998 report on human rights, mass exoduses and internal displacement,[49] submitted pursuant to Commission on Human Rights resolution 1997/39, the Representative of the Secretary-General, Mr. Francis M. Deng presented an addendum that contains a document entitled Guiding Principles on Internal Displacement.[50] This document was drawn up with the assistance of a team of experts basing their work on a preceding analysis of existing legal norms.[51]

Similarities between the Turku Declaration and the Guiding Principles include:

- both documents draw upon existing standards and, hence, represent more an approach of codification than an effort to elaborate new norms of international law;
- both documents are explicit in their specific aim to address various crisis situations and to be applicable in all circumstances;

[49] UN doc. E/CN.4/1998/53

[50] UN doc. E/CN.4/1998/53/Add.2

[51] See, UN docs. E/CN.4/1996/52/Add.2 (compilation and analysis of legal norms relevant to the protection of internally displaced persons) and E/CN.4/1998/53/Add.1 (compilation and analysis of legal norms, Part II: Legal Aspects Relating to the Protection against Arbitrary Displacement)

- both documents are likewise explicit in codifying norms that are to be respected by everyone, not only States or governments; and
- both documents can be seen as reacting to modern-day crisis situations in that the phenomenon of displacement of populations or population groups is seen to require specific attention.

The evident differences between the two documents are:
- the Guiding Principles are targeted and specific; hence they address the specific problem of displacement and the vulnerable situation of displaced persons in much greater detail; and
- for the Representative of the Secretary-General the Guiding Principles serve as a tool in building up a mechanism for protecting internally displaced persons;[52] this differs from the Turku Declaration approach which is more oriented towards producing a text (a Declaration) that would establish the applicable substantive standards.

The Guiding Principles are a result of careful drafting based on thorough analysis of existing international law. One of their contributions to the overall project on fundamental standards of humanity is in demonstrating the close interdependence between various norms belonging to the category of fundamental standards of humanity. Although the starting-point of the Guiding Principles is in protecting certain elements of freedom of movement in times of crisis, the vulnerable position of internally displaced persons has caused the need to include, in the Guiding Principles, several references to the necessary protection of many other human rights in the case of internally displaced persons.[53] In relation to the text of the Turku Declaration the Guiding Principles are important for demonstrating the interdependence of certain civil rights to be protected in situations of crisis, and certain economic, social and cultural rights.[54]

Another document also related to freedom of movement and article 7 of the Turku Declaration is the Draft Declaration on Population Transfers

[52] See, the two last paragraphs of UN doc. E/CN.4/1998/53: "76. If the mandate is renewed, its catalytic role will focus on promoting the practical application of the Guiding Principles by all those concerned with the internally displaced and, through the collaborative approach, generating a system-wide institutional and operational response to the plight of the internally displaced worldwide." and "77. .. The Commission took the lead in 1992, and now has the normative and institutional foundation upon
which to build a more effective and sustainable system of international response to the global crisis of internal displacement"

[53] See, for instance, Principle 4 (non-discrimination), and Principle 10 (right to life).

[54] See, Principle 18 (the right to an adequate standard of living), Principle 19 (medical care and attention), Principle 23 (the right to education).

and the Implantation of Settlers, included in a 1997 final report by the Special Rapporteur, Mr. Al-Khasawneh, on human rights and population transfers.[55] Even this Draft Declaration sets out standards applicable in all circumstances (article 1) and to be respected by all (article 2).

4.7. Protection of civilians in armed conflict

Many of the parallel developments discussed above have had an influence on a growing awareness, on the top level of international politics, of the inadequate status of existing treaty law in relation to the contemporary nature of crisis situations. "Protection of civilians in armed conflict" was the heading under which the UN Security Council decided to look into the matter in early 1999.[56] After an open meeting on the issue the Secretary-General was asked to prepare a report with recommendations on how the Security Council could act to improve both the physical and legal protection of civilians in situations of armed conflict. In September 1999 the requested report[57] was presented, discussed in an open meeting[58] and endorsed through a unanimous Security Council Resolution.[59]

The report by the Secretary-General shows, in general, good awareness of the challenges posed by contemporary conflicts[60] and the panoply of various efforts to cope with those challenges through filling in the existing gaps in international law.[61]

As requested by the Security Council, the Secretary-General's report is focused on concrete recommendations for action by the Security Council itself. Here the report and its recommendations clearly make an independent contribution compared to the discussions presented above that have largely been related to the normative framework for protecting fundamental standards of humanity during crisis. The main emphasis of the Secretary-General's report is on measures related to humanitarian assistance; peace-making, peacekeeping and peace-building; the

[55] UN doc. E/CN.4/Sub.2/1997/23

[56] See, UN doc. S/PRST/1999/6, Statement by the President of the Security Council

[57] S/1999/957

[58] One of the novelties in the exercise was the first-ever appearance of the UN High Commissioner for Human Rights before the Securiy Council.

[59] S/RES/1265 (1999)

[60] Chapter II of the Secretary-General's report is a discussion on threats and violence against civilians in armed conflict, see UN doc. S/1999/957 paras. 6-26

[61] For instance, specific reference is made to the Guiding Principles on Internal Displacenent, see para. 12 and accompanying footnote.

sanctions regime;[62] and various practical measures related to dissemination of information and training. The role of non-State actors,[63] the question of ratification and implementation by States of treaties on human rights and international humanitarian law,[64] development of international criminal law,[65] the role of non-derogable rights in the ICCPR,[66] and minimum age of recruitment in the armed forces and other armed groups[67] are among the many themes common to the Secretary-General's report and one or more of the efforts discussed above.

A specific recommendation is made to "encourage States to follow the legal guidance provided in the Guiding Principles on Internal Displacement".[68] Although no similar recommendation is presented in relation to the Turku Declaration, the way the Guiding Principles are referred to as representing valid international standards is illustrative of one potential role for a general compilation on fundamental standards of humanity, even if issued in the form of a soft law instrument.

Similarly to the ICHRP report on non-State armed groups, the Secretary-General's report reminds us of a weak point in the Turku Declaration: the absence of components of fundamental standards of humanity in the field of political rights, primarily freedom of expression. In our world of mass communication the role of the media is extremely important in both triggering off and preventing conflicts. The Secretary-General's recommendations on this point relate to "appropriate measures" to close down hate media assets and to dissemination of information.[69]

Another approach similar to the ICHRP report is the emphasis put on "working with armed groups", in the form of securing the possibility of humanitarian actors to maintain a dialogue with relevant non-state actors.[70]

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[62] Here, emphasis it put on "targeted" or "smart" sanctions, which can be seen as taking into account the criticisms voiced from within the human rights community about the negative human rights consequences of "comprehensive" or "blunt" sanctions. See, para. 54 and accompanying footnotes and recommendations.

[63] See, e.g., para. 8

[64] para. 36

[65] para 37

[66] para. 36, secondf part of the recommendation

[67] paras. 40-42, compare to article 10 of the Turku Declaration but also to post 1990 developments in strengthening the legal regime against recruiting children.

[68] para. 39

[69] para. 48

[70] para. 51

What is unique for the role of the Security Council and perhaps neglected in other discussions on fundamental standards of humanity, is its possibility to decide on actions of enforcement under Chapter VII of the UN Charter. While thirty-nine of the forty recommendations in the Secretary-General's report focus on preventing atrocities against civilians, the fortieth is related to appropriate enforcement action. Drawing upon earlier Security Council resolutions on crisis situations in the 1990s, the report draws up a list of factors to be considered when the Security Council considers action under Chapter VII. The starting-point for the list is that massive and systematic breaches of human rights law and international humanitarian law constitute threats to international peace and security.[71] The first criterion is formulated as follows:

"The scope of the breaches of human rights and international humanitarian law including the number of people affected and the nature of the violations."

One possible use for an authoritative compilation of fundamental standards of humanity would be to provide guidance to the Security Council in its interpretation of Chapter VII of the UN Charter on what types and instances of human rights violations constitute a threat to international peace and security.

In relation to the four gaps presented in section 3 of this paper, the Secretary-General's report is relevant in the case of all of them. In particular, it is to be noted that the powers of the Security Council under Chapter VII of the UN Charter provide possibilites for overcoming Gap Nos. 1, 2 and 4: the thresholds for applying treaties on international humanitarian law, the failure of certain States to ratify pertinent treaties, and situations where non-State actors have a major role in violating fundamental standards of humanity. If other developments could cover the substantive gap (Gap No. 3), then the powers of the Security Council could maybe remove obstacles related to the three other gaps? To be realistic, however, one must admit that action by the Security Council under Chapter VII cannot address all crisis situations where fundamental standards of humanity deserve attention and protection. Hence, it does not provide a full solution to any of the four gaps.

[71] para. 67, see also paras. 30 and 31.

5. THREE QUESTIONS FOR DISCUSSION

5.1. Are there gaps that remain?

The developments in the 1990s, as well as still ongoing developments, point towards successes and available possibilities in filling in the four gaps that served to demonstrate the need for an instrument on fundamental standards of humanity.

The Ratification gap (No. 2) has partly been filled by a gradual development towards universal ratification. The ICRC study on customary humanitarian law operates in the same direction. The ICC Statute and the powers of the Security Council under Chapter VII of the UN Charter are also relevant in addressing Gap No. 2. The role of a new international instrument on fundamental standards of humanity in remedying the remaining gap is highly dependent on the form such an instrument would take (see below). Aiming at a legally binding treaty might even include a risk of widening the ratification gap.

The Substantive gap (No. 3) primarily related to the institution of derogation under human rights treaties could be greatly reduced if the Human Rights Committee proved to be successful in its project for a new general comment on article 4 to the Covenant on Civil and Political Rights. So far, this project has benefited from the Turku Declaration and the later stages of the discussion on fundamental standards of humanity. The ICHRP study, the ICC Statute and the Guiding Principles on Internal Displacement also address certain dimensions of this gap.

Furthermore, recent developments in the field of international criminal law, here meant to include also the notion of universal jurisdiction, indicate progress in filling the Application gap as to the duty-bearers (No. 4). Other approaches towards accountability for the actions of non-State armed groups, broad State responsibility and encouraging through incentives the respect for fundamental standards of humanity, may contribute in the same direction. Reference is made to the ICHRP study. The last-mentioned dimension speaks *for* the elaboration of a *soft law* (not State-centred) instrument proclaiming fundamental standards of humanity to be respected by everyone.

The area were recent developments appear as least promising is the Application gap as to the circumstances (No. 1), related to the fact that so many conflicts of today do not qualify under the various thresholds of applying international treaties on humanitarian law. A new Protocol to

the Geneva Conventions, aimed to lower these thresholds so that modern-day crisis situations would trigger the applicability of humanitarian law, does not appear as an attractive solution. Such an effort would reopen what has been achieved in filling gaps Nos. 2 and 4. The ICC Statute and Chapter VII of the UN Charter provide possibilities for addressing certain situations that do not trigger off the application of the Geneva Conventions or their Protocol II. Efforts to fill in the substantive gap (No. 3) help to reduce the number of situations where Gap No. 1 becomes a crucial issue.

The general conclusion to be drawn from all that has been said above is that the gaps still exist and speak for continuing the project on fundamental standards of humanity. This project itself – as a process – provides support for all sectoral efforts to deal with the specific gaps or certain dimensions of them. Already the Turku Declaration, as a document adopted by a small group of experts, has served a useful purpose. An updated and extended declaration on fundamental standards of humanity would have the same function in the future.

5.2. What type of a new international instrument on fundamental standards of humanity would be useful?

The ideas presented under the preceding question point towards not posing the question whether *any* new international instrument on fundamental standards of humanity would be useful. Some types of an instrument might be truly beneficial, others might create more problems than solutions.

Without going through all available alternatives and their respective pros and cons, a tentative proposal is made here that a soft law type of a document would be the proper course of action. If one of the high priority aims is to promote respect for fundamental standards of humanity by non-state armed groups, then it makes no sense to strive for an international treaty prepared, negotiated, adopted and ratified by States. Even a declaration adopted by a body composed of government representatives (like the UN General Assembly or the Commission on Human Rights) might be too State-centred in nature. Rather, one should strive for an ad-hoc conference of governmental, academic, IGO and NGO experts that would enjoy a high degree of neutrality in relation to conflicts that occur between governments and armed groups. The participation of some

prominent former leaders of national liberation movements would further contribute to the same end.[72]

The feasibility of a soft law type of an instrument on fundamental standards of humanity, more extensive than the 1990 Turku Declaration and taking into account the various new developments discussed in Section 4 above, does not depend solely or even primarily on the answer given to the question whether there are gaps that remain. Even if the recent and ongoing developments would justify a conclusion that *none* of the gaps referred to Section 3 of this paper remained, the mere complexity of the issue calls for a relatively brief document, accompanied by an expert commentary, on fundamental standards of humanity, applicable in all circumstances. And in the more likely case that thhe analysis leads to the conclusion that at least *some* of the gaps remain relevant in *some* aspects or in relation to *some* actors, the need for a pedagogical tool on fundamental standards of humanity is among the main reasons for pursuing with the project.

5.3. What is the next step on the road?

If the first two questions are answered roughly along the lines suggested above, the proposed next step in the project on fundamental standards of humanity is to turn attention towards the *substance*. The ICC Statute, the ICHRP report on non-State armed groups, the soon finalised ICRC commentary on customary international humanitarian law, the Guiding Principles on Internal Displacement, the future Human Rights Committee general comment on non-derogable rights, and many other documents and processes add to our understanding of what are the legal norms that constitute the body of fundamental standards of humanity and how they should be expressed in order to reach highest possible precision and clarity. An international expert meeting, "Cape Town No. 2", could be arranged specifically for this purpose prior to arranging the conference referred to in question 5.2. In the era of modern information technology, however, it might be appropriate to entrust a group of experts to work towards a draft, primarily through Internet conferencing and other forms of networking prior to convening an actual meeting.

[72] This tentative proposal has been highly influenced by the draft report on armed groups prepared by the International Council of Human Rights Policy. The main idea is maximal efficiency instead of formal legal force.

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